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THE
CANADIAN RAILWAY ACT
1919

9-10 GEO. V. CAP. 68
AND AMENDING ACTS, 1920

WITH NOTES OF CASES DECIDED THEREON, INCLUDING THE DECISIONS
OF THE BOARD OF RAILWAY COMMISSIONERS RESPECTING

TELEPHONE, TELEGRAPH AND EXPRESS COMPANIES

By ANGUS MACMURCHY, K.C. AND SHIRLEY DENISON, K.C.

Third Edition

BY
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JOHN D. SPENCE

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PREFACE TO THE THIRD EDITION

Since the Second Edition of this work was published in 1911 The Railway Act with its amendments has been again revised and consolidated, (1919, 9-10 Geo. V. cap. 68), and many cases have been decided by the Courts and by the Board of Railway Commissioners involving important questions of Railway Law. For these reasons a new edition has become necessary; indeed the changes in the Act and the reported decisions upon it have been so numerous that a great part of the book has had to be completely rewritten. Among the more important amendments are those relating to the conduct of arbitrations to fix compensation for lands taken for railway purposes or injuriously affected by railway construction—these are now usually conducted by the Judge of the County Court as sole arbitrator instead of by three arbitrators as formerly—those permitting companies to give lands or easements or construct works by way of compensation for damage done to land, those compelling railway companies to give the use of their facilities to other companies to assist the movement of grain, and those bringing Government Railways under the control of the Board for certain purposes.

The Editors are indebted to Mr. P. J. Farrell, Chief Counsel, and Mr. W. R. McFarland, Assistant Counsel, Interstate Commerce Commission, Washington, for reading the sections of this work relating to traffic, tolls and tariffs, and adding useful references to relevant decisions of the Commission and Courts of the United States. Mr. A. D. Armour, Barrister, Toronto, has given valuable assistance with those portions of the work relating to the expropriation of lands and Mr. H. W. Macdonnell, Barrister, Toronto, has assisted greatly with other portions of the book. To these and other friends grateful acknowledgment is made.

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CORRESPONDING SECTIONS OF OLD AND NEW ACT.

A Table showing where the sections of the old Railway Act (R.S. C 1906, c. 37), and its amendments, appear in the new Act (Statutes of 1919, c. 68).

The sections marked with an asterisk (*) have been amended, or new subsections added thereto.

The parallel columns are respectively the chapter and section of the old Act and the corresponding section of the new Act.

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"	3	"	3	*"	36	"	27	"	72	"	91
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			{ 359	*"	41	"	55	"	77	"	319
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ADDITIONS AND CORRECTIONS

- P. 104, last line but one, "sec. 8" should read "sec. 58."
- P. 171, 10 lines from bottom of page, read "10" before "U.C.L.J."
- P. 206, line 25, add "Minister of Munitions v. Mackrill, (1920) 3 K.B. 513."
- P. 208, line 18, "sec. 233" should read "sec. 203."
- P. 209, after the 5th line add "A Railway Company now has power under sec. 222 to grant lands or easements."
- P. 243, 7th and 8th lines from the bottom of page, "license" should read "licensee."
- P. 485, line 8, add "C.P.R. v. Smith, 62 S.C.R. 134."
- P. 520, line 39 should be read before line 37.
- P. 552, line 7 from bottom of page, citation for Providence Coal Co. Case should be "1 I.C.R. 363."
- P. 563, line 27, "192 U.C." should read "192 U.S."
- P. 621, line 20, add "As to liability where freight is carried in contravention of the Lord's Day Act, see Rise v. C.P.R., 3 Alta L.R. 154, 14 W.L.R. 635."
- P. 688, omit line 4, and insert in lieu thereof "Brunswick Ry. Co. 23 N.B.R. 323, New Brunswick Ry."
- P. 739, "Various Offences" should be inserted before "sec. 443."
- P. 751, line 2, add "See Rise v. C.P.R. supra p. 621."

TABLE OF ABBREVIATIONS

A.C.	Appeal Court, Chancery, Appeal Cases.
(1891) A.C.	Law Reports, Appeal Cases (1891 on- ward)
App. Cas.	Law Reports, Appeal Cases (1876-1890)
A. & E.	Adolphus & Ellis. Q.B.
A.R. or App.R.	Appeal Reports
Alta. L. R.	Alberta Law Reports.
Albany L. J.	Albany Law Journal.
Am. & Eng. Ry. Cas.	American and English Railway Cases.
Am. & Eng. Ency. of Law.	American and English Encyclopedia of Law.
B. & A. or B. & Al.	Barnewall and Alderson, K. B.
B. & Ad.	Barnwell and Adolphus, K. B.
B. C. R.	British Columbia Reports
B. & P.	Bosanquet and Puller, C. P.
B. & S.	Best and Smith, Q. B.
Barb.	Barbour, New York.
Beav.	Beaven, Rolls Court.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench Reports, New Series.
C. L. J. or Can. L. J.	Canadian Law Journal.
C. L. T. or Can. L. T.	Canada Law Times.
C. M. & R.	Crompton, Meeson & Roscoe's Ex.
C. P.	Common Pleas.
C. P. D.	Law Reports Common Pleas Division.
C. R. C. or Can. Ry. Cas.	Canadian Railway Cases.
Cameron's S. C. Practice.	Cameron's Canada Supreme Court Prac- tice.
Camp.	Campbell's Reports Nisi Prius.
Cam. S. C. Cas.	Campbell's Supreme Court Cases.
Can. Ex. C. R.	Canadian Exchequer Court Reports.
Can. Ry. Cas. (See C. R. C.)	
Can. S. C. R. (or S. C. R.)	Canadian Supreme Courts Reports.
Cart.	Cartwright's Cases on B.N.A. Act.
Cass. Can. S. C. R.	Cassels Digest Canada Supreme Court Reports.
Ch.	Chancery.
Ch. App.	Law Reports, Chancery Appeals.
Ch. D.	Law Reports, Chancery (1876-1890).
Conn.	Connecticut.
Cox, C. C.	Cox's Criminal Cases.
D. L. R.	Dominion Law Reports.
De G. & J.	De Gex and Jones. Ch. App.
De G. & S.	De Gex and Smale. Ch.
Döwl.	Dowling Practice Cases.
Dr. & Sm.	Drewry and Smale. Ch.

E. & B. or El. & Bl.	Ellis and Blackburn. Q. B.
E. B. & E.	Ellis, Blackburn and Ellis, Q. B.
E. & E.	Ellis and Ellis, Q. B.
East L. R.	East's Law Reports. K. B.
Ex. or Exch.	Exchequer Reports.
Ex. C. R.	Exchequer Court Reports.
Ex. D.	Law Reports, Exchequer.
F. (Ct. Sess. 5th Ser.)	Fraser, Court of Session Cases (Scotland)
or F. (Just. Cas.)	5th. Series.
F. & F.	Foster and Finlason.
Fed. R. or Fed. Rep.	Federal Reporter, U.S.
Geld. & Oxley	Geldert and Oxley, Nova Scotia Decisions, Supreme Court (1867-1875).
Giff.	Giffard. Ch.
Gr. or Grant.	Grant's Chancery Reports. (Ontario).
Gray, (Mass)	Gray, Massachusetts Reports.
H. & C.	Hurlstone and Coltman, Ex.
H. L. or H. L. C. or H. L. Cas.	House of Lords Cases.
H. & M.	Hemming and Miller. Ch.
H. & N.	Hurlstone and Norman. Ex.
Hare.	Hare. Ch.
Hun.	Hun, New York Supreme Court.
I. C. C.	Interstate Commerce Commission Reports
I. C. R.	Interstate Commerce Reports.
I. L. T. R.	Irish Law Times Reports.
I. R.	Irish Reports.
Ill.	Illinois Supreme Court.
Ind.	Indiana.
Ir. C. L.	Irish Common Law Reports.
J. & H.	Johnson and Hemming, Ch.
J. P.	The Justice of the Peace.
Jur. N. S.	Jurist, New Series.
K. B.	Kings Bench.
K. & J.	Kay and Johnson, Ch.
Kay.	Kay, Ch.
L. C. J. or L. C. Jur.	Lower Canada Jurist,
L. C. L. J.	Lower Canada Law Journal.
L. C. R.	Lower Canada Reports.
L. J. Ch.	Law Journal Reports, Chancery.
L. J. Ex.	Law Journal Reports, Exchequer.
L. J. M. C. or Mag. Cas.	Law Journal Reports Magistrates' Cases.
L. J. P. C.	Law Journal Reports, Privy Council.
L. J. Q. B.	Law Journal Reports, Queen's Bench.
L. N. or Leg. News.	Legal News.
L. R. C. P.	Law Reports, Common Pleas Division.
L. R. Eq.	Law Reports Equity.
L. R. Ex. D.	Law Reports Exchequer Division.

L. R. H. L.	Law Reports, English and Irish Appeal Cases, House of Lords.
L. R. Ir.	Law Reports, Ireland.
L. R. Q. B.	Law Reports, Queen's Bench.
L. R. Sc. App.	Law Reports Scotch and Div. Appeals.
L. T. or L. T. N. S.	Law Times, New Series.
Law Jo.	Law Journal.
M. L. R. or Mont. L. R.	Montreal Law Reports.
M. L. R. Q. B.	Montreal Law Reports Queen's Bench.
M. L. R. S. C.	Montreal Law Reports, Superior Courts.
M. & M.	Moody and Malkin.
M. & S.	Maule and Selwyn K B.
M. & W.	Meeson and Welsby. Ex.
Mac. & G. or McN. & G.	Macnaghten and Gordon. Ch.
Macq. H. L. or Macq. Sc. App.	Macqueen's Scotch Appeal Cases.
Man. L. R. or Man. Rep.	Manitoba Law Reports.
Mann. & G.	Manning and Granger. C.P.
Mass.	Massachusetts Supreme Court.
Mich.	Michigan Supreme Court.
Minn.	Minnesota Supreme Court.
Mo. App.	Missouri Appeals.
Moore, P. C.	Moore, P. C.
N. B. R.	New Brunswick Reports.
N. J. Eq.	New Jersey Equity Reports.
N. J. L.	New Jersey Law Reports.
N. & Mac. or Nev. & Mac.	Neville and Macnamara's Railway and Canal Cases.
N. S. R.	Novia Scotia Reports.
N. Y.	New York Reports, Court of Appeals.
O. L. R.	Ontario Law Reports.
O. R.	Ontario Reports.
O. S.	Upper Canada Reports, Old Series.
O. W. N.	Ontario Weekly Notes.
O. W. R.	Ontario Weekly Reporter.
Ont. App. Rep.	Ontario Appeal Reports.
P.	Probate.
P. C.	Privy Council.
P. R.	Practice Reports.
Pac. Rep.	Pacific Reporter.
Paige.	Paige, New York, Ch.
Peake.	Peake, Nisi Prius
Penn. St.	Pennsylvania State Reports
Pennypacker (Penn.)	Pennypacker, Pennsylvania Supreme Court Reports.
Q. B.	Queen's Bench Reports (1841-1852.)
Q. B. D.	Law Reports, Queen's Division, (1876-1890).
(1891) Q.B.	Law Reports Fuller's Bench 1891 onwards
Q. L. R.	Quebec Law Reports.
Q. P. R. or Que. P. R.	Quebec Practice Reports.
Q. R. K. B. or Que. K. B.	Quebec Official Reports, King's Bench.
Q. R. Q. B.	Quebec Official Reports, Queen's Bench.
Q. R. S. C.	Quebec Official Reports, Superior Court.
R. C.	Railway Cases.
Ry. & C. Tr. Cas.	Railway and Canal Traffic Cases.
R. L. or Rev. Leg.	Revue Legale, Quebec.

Rettie.....	Scotch Session Cases, 4th Series.
Russ. Eq. R.....	Russell's Equity Decisions of Nova Scotia.
S. C. R.....	Canadian Supreme Court Reports.
S. W. R.....	Southwestern Reporter.
Salk.....	Salkeld. K. B.
Sask. L. R.....	Saskatchewan Law Reports.
Sess. Cas.....	Session Cases.....
Sm. L. C.....	Smith's Leading Cases.
Stark.	Starkie.
T. L. R. or Times L. R.	Times Law Reports.
T. R.....	Term Reports.
Terr. L. R.....	Territories Law Reports.
U. C. C. P.....	Upper Canada Common Pleas.
U. C. Q. B. or U. C. R.....	Upper Canada Queen's Bench Reports.
U. S.....	United States.
U. S. R.....	United States Supreme Court Reports.
Vt.	Vermont Supreme Court.
W. L. R. or West. L. R.....	Western Law Reporter.
W. R.....	Weekly Reporter.
W. W. R.....	Western Weekly Reporter.
Wall.....	Wallace, United States Supreme Court
Wilson Ch.	Wilson Ch.
Wm. Saunders.....	Williams' Saunders. K. B.
Wood.....	United States Circuit Court, Fifth Circuit
Y. & C. Ch.....	Younge and Collyer's Chancery Cases.

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The Railway Act

An Act to consolidate and amend the Railway Act.
9-10 Geo. V., C. 68.

[Assented to 7th July, 1919.]

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title.

1. This Act may be cited as **The Railway Act, 1919.** Short title.
R.S., c. 37, s. 1. Am.

In the Statute 14 & 15 Vict., cap. 51, sec. 2, this Act was described as The Railway Clauses Consolidation Act. In the consolidation 42 Vic., cap. 9, as The Consolidated Railway Act, 1879. In the consolidations C.S.C., cap. 66; 31 Vic., cap. 68; R.S.C., 1886, cap. 109; and 51 Vic. cap. 29, as The Railway Act. In the consolidation 3 Edw. VII., cap. 58, as The Railway Act, 1903. In R.S.C., 1906, c. 37, as The Railway Act.

Interpretation.

Definitions.

2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,— Definitions.

- (1) "Board" means the Board of Railway Commissioners for Canada. R.S., 1906, c. 37, s. 2 (1). "Board."

The first Board of Railway Commissioners was appointed by 14 & 15 Vict., cap. 73, sec. 17, which was an Act for the construction of a main trunk line through the Provinces of Upper and Lower Canada and connecting with a proposed railway through Nova Scotia and New Brunswick. By that section the Receiver-General, Inspector-General, Commissioner and Assistant Commissioner of Public Works, and Postmaster-General were appointed a Board of Railway Commissioners for the purpose of supervising the carrying out of this work in Canada. By 20 Vict., cap. 12, they were afterwards appointed to supervise the carrying out of the provisions of that statute regarding the safety of passengers and prevention of accidents on railroads and their appointment was continued for similar purposes by C.S.C., cap. 66. Upon

Confederation the tribunal described as the Railway Committee of the Privy Council was substituted for the Board of Railway Commissioners. See 31 Vict., cap. 68, sec. 23 (D.). The Railway Committee continued to exercise supervision over Dominion railways under consolidations subsequent to Confederation until the enactment of the statute of 1903, by which its powers were vested (sec. 11; sec. 32 of the present Act) in the Board.

"By-law"

- (2) "by-law," when referring to an act of the company, includes a resolution. R.S. 1906, c. 37, sec. 2 (2).

This should be read with the Interpretation Act, R.S. C., cap. 1, sec. 31 (g), which provides that wherever power to make rules, regulations, or by-laws is conferred it shall include the power from time to time to alter or revoke the same and make others.

See sections 122 and 290-297, *infra*, for regulations respecting the making of by-laws.

Under 59 Vict., cap. 9, sec. 2 (D.), all resolutions passed instead of by-laws under section 58 of 51 Vict., cap. 29 (D.), were declared to be valid and were confirmed, and this section has not been repealed; see 3 Edw. VII., cap. 58, sec. 310.

"Charge."

- (3) "charge," when used as a verb with respect to tolls, includes to quote, demand, levy, take or receive; R.S. 1906, c. 37, sec. 2 (3).

"Company"
and
"Railway
Company."

- (4) "company" includes a person, and where not otherwise stated or implied means "railway company," unless immediately preceded by "any," "every" or "all," in which case it means every kind of company which the context will permit of; and "railway company or "company" when it means or includes "railway company,"—

- (a) includes every such company and any person having authority to construct or operate a railway; and
(b) in the sections of this Act which require companies to furnish statistics and returns to the Board, or provide penalties for default in so doing, includes further any company constructing or operating a line of railway in Canada, even though such company is not otherwise within the legislative authority of the Parliament of Canada, and includes also any individual not incorporated who is the owner or lessee

of a railway in Canada, or party to an agreement for the working of such a railway;

Formerly 51 Vict., cap. 29, sec. 2 (a), and 3 Edw. VII., cap. 58, sec. 2 (c). See 8 Vict., cap. 20, sec. 3 (Imp.), 17 and 18 Vict., cap. 31, sec. 1 (Imp.), 30 & 31 Vict., cap. 127, sec. 3, and 31 & 32 Vict., cap. 119, sec. 2; 3 Edw. VII., c. 58, sec. 302; R.S.C., 1906, c. 37, sec. 4.

In the Act of 1906, sub-secs. 4 and (a) read as follows:

“ (4) ‘company’

(a) means a railway company and includes every such company and any person having authority to construct or operate a railway.”

It was explained before the Special Committee of Parliament that the change was made because of the decision of the Privy Council (**Toronto and Niagara Power Co. v. Town of N. Toronto**, (1912) A.C. 834; 5 D.L.R. 43), that sec. 247 of the Act of 1906 (corresponding to sec. 373 of this Act), applied only to railway companies.

The word “Board” in sub-sec. (a) has been substituted for “Minister.”

The word “includes” in the third line of sub-sec. (b) has been substituted for “means” and the word “also” has been added after the word “includes” in the seventh line.

A subsection relating to telephone companies which was numbered 4 (b) in the Act of 1906, will be found amended to include telegraph companies, as sec. 375 (1) of the present Act.

The word “further” in sub-section 4 (b) evidently indicates that section 4 (a) is intended to apply only to companies which are generally within the jurisdiction of the Dominion Parliament. This sub-section and sec. 8 seem to show that where it was intended that a specific provision of the Act should apply to provincial railway companies, that has been expressly stated. Per Duff, J., in **Montreal Tramways v. Lachine etc., Ry. Co.**, 18 C.R.C. 122; 50 S.C.R., 84. See also sec. 5, *infra*. The legislation contained in section 437 and succeeding sections of the present statute falls under section 91 (6) of the B.N. A. Act and is no doubt *intra vires* notwithstanding the exclusive jurisdiction of provincial legislatures as to local undertakings not declared to be for the general advantage of Canada.

"Company" means a railway company under Dominion jurisdiction, unless otherwise specified. **Montreal Tramways v. Lachine Ry. Co.**, 18 C.R.C. 122; **Lachine Ry. Co. v. Montreal Tramways**, 18 C.R.C. 133.

"Costs."

(5) "costs" includes fees, counsel fees and expenses. R.S. 1906, c. 37, sec. 2 (5).

See sections 46, 61, 223, 237, 242, etc. It means as between solicitor and client: **Can. Northern Co. v. Robinson**, 8 Can. Ry. Cas. 244; 17 Man. R., 579.

As to practice in awarding costs, see **Currie v. C.P.R.**, 13 C.R.C. 31; **C.P.R. v. Walkerton**, 15 C.R.C. 85;

"County."

(6) "county" includes any county, union of counties, riding, **district**, or division corresponding to a county, and any separate municipal division of a county; Formerly 51 Vict., cap. 29, sec. 2 (b); 3 Edw. VII., cap. 58, sec. 2 (e); R.S.C., 1906, c. 37, sec. 2, sub-sec. 4 (6). See also Interpretation Act, R.S.C., 1906, c. 1, sec. 34 (3).

In the Act of 1906, the words, "in the province of Quebec" appeared between "and" and "any" in the last line. The word "district" was not in the former Act.

"Court."

(7) "court" means a superior court of the province or district, and, when used with respect to any proceedings for

(a) the ascertainment or payment, either to the person entitled, or into court, of compensation for lands taken, or for the exercise of powers conferred by this Act, or

(b) the delivery of possession of lands, or the putting down of resistance to the exercise of powers, after compensation paid or tendered,

includes the county court of the county where the lands lie; and "county court" and "superior court" are to be interpreted according to the Interpretation Act and amendments thereto:

"County court;"
"Superior court."
R.S., c. 1.

51 Vic., c. 29, sec 2 (c) ; 3 Edw. VII., c. 58, secs. 2 (f) and 156; R.S.C., 1906, c. 37, sec. 2, sub-sec. 7.

The "proceedings" referred to are indicated in sections 215 to 243 of the present Act.

The corresponding definition of "judge" in subsection 13 must be read in connection with sub-section 7 and ex-

cept as indicated by sub-sections 7 (a) and 7 (b) does not include a County Court judge. For example, application under section 206 must still be made to a Superior Court Judge.

The words "after compensation paid or tendered" in sub-sec. (b), debar county judges (perhaps unintentionally), from granting warrants under sec. 240.

The words after the word "lie" to the end of the sub-section are new.

(8) "Exchequer Court" means the Exchequer Court of Canada; R.S., 1906, c. 37, sec. 2 (8). "Exchequer Court."

(9) "express toll" means any toll, rate or charge to be charged by any company, or any person or corporation other than the company, to any persons, for hire or otherwise, for or in connection with the collecting, receiving, caring for or handling of any goods for the purpose of sending, carrying or transporting them by express, or for or in connection with the sending, carrying, transporting or delivery by express of any goods, or for any service incidental thereto, or for or in connection with any or either of these objects, where the whole or any portion of the carriage or transportation of such goods is by rail upon the railway of the company; R.S. 1906, c. 37, sec. 2 (9). "Express Toll."

This sub-section has special reference to sections 360 to 366 (*infra*), (6 Edw. VII., cap. 42, sec. 27); R.S., 1906, c. 37, secs. 348 to 354, by which express tolls are made subject to the approval of the Board.

The word "any" before "company" in the second line, read "the" in the former Act. As to the effect of this change, see the definition of "company" sub-sec. 4, above.

A railway company itself operating an express service without the intervention of an express company was ordered to file a tariff of express tolls. **Cardston Board of Trade v. Alberta R. and I. Co.**, 9 C.R.C. 214.

See sub-sections 30, 31 and 32, *infra*.

(10) "goods" includes personal property of every description that may be conveyed upon the railway, or upon steam vessels or other vessels connected with the railway; "Goods."

Formerly 51 Vict., sec. 2 (f) amended; 3 Edw. VII., cap. 58, sec. 2 (h), R.S. 1906, c. 37, sec. 2 (10). The

same word is defined in the English Acts, 8 Vict., cap. 20, sec. 3, from which the definition in 51 Vict., cap. 29 (D.), sec. 2 (f) was taken. Compare the definition of the word "merchandise" in the English Act, 51 & 52 Vict., cap. 25, sec. 35. Presumably this definition of the word "goods" would apply as well to passengers' luggage and cattle which occurred in the English definition of the word "traffic" in 17 & 18 Vict., cap. 31, sec. 1, and 36 & 37 Vict., cap. 48, sec. 3. See **The Queen v. Slade**, 21 Q.B.D. 433, and **McCormack v. G.T.R.**, 3 C.R.C. 185; also note to that case 3 C.R.C., p. 189.

"Highway."

(11) "highway" includes any public road, street, lane or other public way or communication;

Formerly 51 Vict., cap. 29, sec. 2 (g); 3 Edw. VII., cap. 59, sec. 2 (i), R.S. 1906, c. 37, sec. 2 (11). No similar definition appears in the English Acts.

In **The Township of Gloucester v. Canada Atlantic Ry. Co.**, 1 C.R.C. 327, p. 331, Lount, J., says: "The defendants say that by this interpretation and the construction to be placed upon it by the section of the Act where the word 'highway' is used the proper meaning to be given is 'A public road opened up and in actual use by the public' and not an unopened road. I do not see why this restricted meaning should be adopted, more especially as the word 'highway' **includes** any public road, street, lane or other public way or communication. I think it must be conceded that Parliament intended to give and did give, to the word 'highway' a full and not a limited meaning."

Therefore he holds that an unopened road allowance is a public highway within the meaning of this section; but it does not include a road merely shown on a plan registered by a private owner and not opened up or adopted by the municipality, **City of Toronto v. G.T.R.**, 32 O.R. 120, 1 C.R.C. 82; nor a mere "trail" or "way" which is not a public highway as of right; **Royle v. C.N.R.**, 14 Man. L.R. 275, 3 C.R.C. 4.

See **Canada Atlantic Ry. Co. v. City of Ottawa**, 2 O.L.R. 336; 4 O.L.R. 56; 1 C.R.C. 298, 305. **Yonge Street Bridge Case**, **G.T.R. v. Toronto**, 10 O.W.R. 483. **Toronto Viaduct Case**, 42 S.C.R. 613.

A *de facto* public crossing was treated as a highway crossing for the purposes of an allowance from the Railway Grade Crossing Fund.

Medicine Hat v. C.P.R., 16 C.R.C., 413.

A private crossing used by the public as a driveway, held not a highway for the purposes of sec. 309.

Gowland v. H. G. and B. Ry. Co., 19 C.R.C. 214.

Street prolongations over which public had enjoyed access from city street to a public harbor held, highways, within the Act.

G.T.R. Co. and C.P.R. Co. v. City of Toronto (Toronto Viaduct Case), 11 C.R.C. 38. Affirmed 12 C.R.C. 378; (1911) A.C. 461.

Where a highway crossing a railway existed in fact prior to 1st April, 1909, though never legally established, the Board made an order legalizing the crossing and directing a contribution from Railway Grade Crossing Fund toward protection.

City of Maisonneuve v. C.N. Ry. Co., 22 C.R.C. 446.

A railway company was ordered to construct standard highway crossing at its own expense at a point where there had been an old trail, and where it had permitted the public to cross for a long period.

Moodie v. C.P.R. Co., 20 C.R.C. 217.

A crossing extensively used by the public over a railway is not necessarily a highway crossing so as to require company to give statutory signals.

De Vries v. C.P.R. Co., 20 C.R.C. 375; 27 D.L.R. 20.

Where a bridge had been constructed by a railway company to accommodate pedestrian traffic as well as to carry the railway, it was held that the walks were a "public way or communication" and that the Board had jurisdiction to order the company to continue them, but none (in the circumstances of the case) to compel the company to provide for vehicular traffic as well: **City of Victoria v. Esquimalt etc., Ry. Co.**, 24 C.R.C. 84.

A highway potentially existing by virtue of a general reservation of five per cent. for highways provided for by an Order in Council (though not laid out nor either specifically nor generally reserved when the Crown granted the railway lands), was treated as an unopened road allowance; and the cost of a crossing over the railway was placed upon the company: **C.P.R. Co. v. Ontario Dept. of Public Works**, 24 C.R.C., 231; 58 S.C.R., 189; 45 D.L.R. 413.

(12) "inspecting engineer" means an engineer who is directed by the Minister, or by the Board, to exam-

"Inspecting Engineer."

ine any railway or works, and includes two or more engineers, when two or more are so directed; R.S., c. 37, sec. 2 (12).

"Judge."

(13) "judge" means a judge of a superior or county court hereinbefore mentioned, as the case may be; R.S., c. 37, sec. 2 (13).

See note under sub-sec. 7, *supra*.

"Justice."

(14) "justice" means a justice of the peace acting for the province, district, county, riding, division, city or place where the matter requiring the cognizance of a justice arises; and, when any matter is authorized or required to be done by two justices, the expression 'two justices' means two justices assembled and acting together; R.S., c. 37, sec. 2 (14).

The word "province" was not in the former Act. See sub-sec. 37, *infra*.

The section formerly contained, after the word "arises," the words "and who is not interested in the matter."

"Lands."

(15) "lands" means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, **and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same**; R.S., c. 37, sec. 2 (15).

For English definitions see 8 Vict., cap. 18, sec. 3 (Imp.), and 8 Vic., cap. 20, sec. 3 (Imp.). In England these definitions were held to include sub-soil where there was authority in a special Act to take the sub-soil without appropriating the surface. **Farmer v. Waterloo Ry. Co.** (1895), 1 Ch. 527. It is said in Browne and Theobald 3rd Edition, p. 134, that it also includes an easement, but in **Re Metropolitan District Ry. Co. and Cosh**, 13 Ch. D. 607 at p. 616, Jessel, M. R., states that it does not include an easement and the promoters have no right to require land owners to sell them a mere easement in the land. Considered **Midland Ry. Co. v. Wright** (1901), 1 Ch. 738. See also **G.W.R. Co. v. Swindon, etc., Ry. Co.**, 22 Ch. D. 677, 9 A.C. 787, where the question was much discussed but no definite decision was come to. See **De-**

Camp v. Hibernia Ry. Co., 47 N.J.L. 43, 518. In *re James Bay Ry. Co. and Worrell*, 5 C.R.C. 23 it was held by MacMahon, J., that a reservation to the land owners of certain water rights and privileges had the effect of invalidating an expropriation notice, as otherwise the effect would be to allow the railway company to expropriate a mere easement as to at least part of the lands described in the notice. Where the railway is empowered by a Special Act to take an easement this word may then be read into the word "lands." **Hill v. Midland**, 21 Ch. D. 143. Under the English Act "lands" also includes minerals. **Erington v. Metropolitan District Ry. Co.**, 19 Ch. D. 559. As to minerals under the Canadian Act, see sections 194 to 198 (*infra*). As to minerals in lands taken and in slopes supporting right of way strip, see **Re Davies and James Bay R.W. Co.**, 16 C.R.C., 78; 28 O.L.R., 544, varied on appeal to Privy Council, 19 C.R.C. 86; (1914) A.C., 1043.

The words from "and any easement" to the end of the sub-section are new. A radical change in the nature and extent of a railway company's rights of expropriation as well as in the procedure to be followed has been made by these words, by the proviso in section 199 and by section 213 (2). The right to expropriate a mere easement (except as set out in sec. 202) is now given for the first time.

As to minerals under lands granted by way of subsidy see **Calgary, etc., Ry. Co. v. Reg.**, 73 L.J.P.C. 110.

Lands as used in section 298 of the Act of 1906 was held to include standing bush. **Campbell v. C.P.R. Co.**, 9 C.R.C., 300; 18 O.L.R., 466.

Where a Special Act defined land so as to include a mere easement it was held that a notice stating an intention to acquire the lands described "to the extent required for the corporate purposes of the company" was too indefinite and was invalid. **Lees v. Toronto & Niagara Power Co.**, 12 O.L.R. 505. 6 Can. Ry. Cas. 128.

(16) "lease" includes an agreement for a lease; R.S. "Lease." c. 37, sec. 2 (16).

Compare 8 Vic., c. 18, sec. 3 (Imp.).

(17) "Minister" means the Minister of Railways and "Minister." Canals; R.S. 1906, c. 37, sec. 2 (17).

As to the powers of the Minister, see R.S. 1906, c. 35. See also secs. 64, 67, 69, 70, 71, 150, 167 and 248, among

others of the present Act. By section 167, *infra*, the power to approve location plans, formerly exercised by the Minister under sec. 157 of the Act of 1906, is now vested in the Board.

"Owner."

(18) "owner," when, under the provisions of this Act or the Special Act, any notice is required to be given to the owner of any lands, or when any act is authorised or required to be done with the consent of the owner, means any person who, under the provisions of this Act, or the Special Act, or any Act incorporated therewith, is enabled to sell and convey the lands to the company, **and includes also a mortgagee of the lands**; R.S. 1906, c. 37, sec. 2 (18). Amended.

The words "and includes also a mortgagee of the lands" are new.

Compare 8 Vic., cap. 18, sec. 3 (Imp.).

The term "owner" in sec. 76 of 8 Vic., cap. 18, (Imp.), is said to contemplate any person having some title to the lands. See Browne and Theobald, p. 193, and cases there cited for decisions upon the English Act. Under the decisions of **Re C.P.R. and Batter**, 1 C.R.C. 457; **Young v. Midland Ry. Co.**, 19 A.R. 265, affirmed **Midland Ry. Co. v. Young**, 22 S.C.R. 190, and **Re Belt Line Ry. Co.** 26 O.R. 413, and **Re Toronto, H. & B. Ry. Co.**, and **Burke**, 27 O.R. 690, it may be said that all parties interested in the lands may be treated as the owners for the purpose of compensation under the statute, and the term is not to be understood in the limited sense of this interpretation clause, but in its natural and ordinary sense. See per Osler, J. A., **Young v. Midland Ry. Co.**, *supra*, at p. 275. And though the title of the person in possession may be defective the railway company may not ignore it so as to justify an entry on the lands he occupies without his consent and without giving him the notices and taking the other steps prescribed by the Act: **Stewart v. Ottawa & New York R.W. Co.**, 30 O.R. 599.

This matter is fully discussed in the notes to **Re C.P. R. and Batter**, 1 C.R.C. at pp. 484, 485 and 486.

A bare trustee is not an owner within the meaning of section 171 of the Act of 1903 (now section 241, *infra*) and notice under that section must be served on the *cestui que trustent*. **Re James Bay Ry. Co.**, and **Worrell**, 5 C.R.C. 21.

Placer miners are owners within the meaning of the Act. **Day v. Klondyke Mines Ry. Co.**, 6 C.R.C. 203.

Unregistered owner held (in Quebec) entitled to intervene in expropriation proceedings, but not so as to invalidate prior proceedings.

Re Montreal, etc., Ry. Co., and Woodrow, 10 C.R.C. 496.

For the purpose of an action against a railway to restrain expropriation, plaintiff's status as one interested in the land is **prima facie** established by his having been served with notice of expropriation.

Haney v. Winnipeg, etc., Ry. Co., 14 C.R.C. 39.

A person having, to the company's knowledge, an interest in land, unregistered till after expropriation begun, has a right to intervene; otherwise, if interest acquired **pendente lite**.

Re Edmonton, etc., Ry. Co., 16 C.R.C., 396.

(19) "plan" means a ground plan of the lands and property taken or intended to be taken; R.S., 1906, c. 37, sec. 2 (19). "Plan."

(20) "provincial legislature" or "legislature of any province" means and includes any legislative body other than the Parliament of Canada; R.S., 1906, c. 37, sec. 2 (20). "Provincial Legislature."

This probably includes the legislature of a province before the union. **Robertson v. G.T.R.**, 6 C.R.C. 494 at p. 511. **G.T.R. v. Robertson**, (1909), A.C. 325, 9 C.R.C. 149.

(21) "railway" means any railway which the company has authority to construct or operate, and includes all branches, **extensions**, sidings, stations, depots, wharves, rolling stock, equipment, stores, property real or personal and works connected therewith, and also any railway bridge, tunnel or other structure which the company is authorised to construct; **and, except where the context is inapplicable, includes street railway and tramway**; R.S., 1906, c. 37, sec. 2 (21). "Railway."

The word "extensions" and the words from "and except" to the end of the sub-section are new.

Taken largely from 55 & 56 Vic., cap. 27 (D.). Compare 8 Vic., cap. 20, sec. 3 (Imp.), 35 & 36 Vic., cap. 50, sec. 2 (Imp.), and 36 & 37 Vic., cap. 48, sec. 1 (Imp.). Under the English Employers' Liability Act it has been held that a railway includes a tramway upon the public road. **Fletcher v. London United Tramways Limited** (1902), 2 K.B. 269. "Railway" distinguished from "tramway:" **Re Niagara, etc., Ry. Co.**, 6 C.R.C. 145.

It has no exact technical, only a variable meaning. **Blackpool, etc., Tramroad Co. v. Thornton** (1907), 1 K.B. at 583.

Under the British Columbia Railway Act, 1890, sec. 38, it was held that a tramway was a railway within the meaning of that act. **Edison General Electric v. Edmonds**, 4 B.C.R. 354.

"Railway tracks" held to include "street railway tracks" under the Customs Act, **Toronto Ry. Co. v. Reg.** (1896), 65 L.J.P.C. 110. See **Montreal, etc., Ry. Co., v. Chateaugay, etc., Ry. Co.**, 35 S.C.R. 48; 4 C.R.C. 83.

Under the English Railway and Canal Traffic Act, 1888, 51 & 52 Vict., cap. 25, sec. 25, a dock company having sidings within the area of its own property only was held not to be a railway. **London & India Dock Co. v. Great Eastern Ry. Co.** (1902), 1 K.B. 568. And lines, sidings and platforms inside a company's premises and freight sheds were held not to be part of lands used for a railway within the meaning of a Municipal Assessment Act. **Williams v. London & North Western Ry. Co.** (1899), 2 Q.B. 197, (1900), 1 Q.B. 760.

It has been held that the term "railway" by itself includes all works authorised to be constructed and therefore includes stations. **Cotter v. Midland Ry. Co.**, 5 R.C. 187 at p. 194; but in England it was held that the term railway under sec. 92 of 8 Vic., cap. 20 (Imp.), did not include a station. **Midland Ry. Co. v. Ambergate R.W. Co.**, 10 Hare 359. In view, however, of the express insertion of the word "stations" in the definition given in the present Act this decision would not apply in Canada.

"Railway" includes a temporary spur constructed for the purpose of obtaining gravel, and in respect of such spur the company can exercise the same powers as to highways, etc., as in respect of the main line. **C.P.R. v. North Dumfries**, 6 C.R.C., 147. But see **Quebec Bridge Co. v. Marie Roy**, 32 S.C.R. 572; 5 C.R.C. 18, for the law

on this point before the passing of 2 Edw. VII., cap. 29, sec. 1 (now sec. 202, *infra*), as to expropriation of materials.

A mining company empowered to build a railroad as well has been held to be a railway in Nova Scotia for the purpose of obtaining the benefit of an exemption from taxation, so far as the railway portion of its works is concerned. **International Coal Co. v. Cape Breton**, 22 S.C.R. 305; and for some purposes even private owners of a railway on their own property may come within the term: **Cooper v. Hamilton, etc., Co.**, 8 O.L.R. 353.

“Railway” as used in sec. 391 does not include a scaffold used in construction of an ice-house for use by a railway company.

Sutherland v. C.N.R. Co., 13 C.R.C. 495. See also **Ryckman v. H.G. and B. Ry. Co.** (1905), 10 O.L.R. 419; **C.N.R. v. Robinson** (1910) 43 S.C.R. 387.

Held by Mabee, Chief Commissioner (McLean, Commissioner, *dubitante*) that “railway” includes a block of land owned by a railway company adjoining its right of way (apparently purchased for the purpose of building a round-house), and that therefore the Board has jurisdiction to authorise a highway to be carried across it.

St. Thomas v. G.T.R., 13 C.R.C. 134.

Where a highway was carried by bridge across tracks and adjoining railway yard (widened by railway company for its own purposes), the municipality was not required to contribute to that part of bridge which crossed the yard.

Saskatchewan District v. C.P.R. Co., 14 C.R.C. 337.

Private spur or siding, for which an industry provides right of way, is not a part of the railway.

Boland v. G.T.R., 18 C.R.C. 60; **Beverley Coal Mine v. G.T.P. Ry. Co.**, 23 C.R.C. 64; **Kammerer v. C.P.R. Co.**, 21 C.R.C., 74.

Company should not construct private sidings on its right of way.

C.P.R. Co. v. Vancouver Ice Co., 23 C.R.C. 1.

Tracks laid by railway company under private agreement in territory not covered by its charter are not part of the railway.

Kelowna v. C.P.R. Co., 15 C.R.C. 441.

"Railway
Act, 1888."

1888, c. 29.

"Registrar
of Deeds."

"Registry of
deeds."

"Rolling
stock."

"Secretary."

"Sheriff."

"Special
Act."

1903, c. 71.

(22) "Railway Act, 1888," means the Act passed in the fifty-first year of the reign of Her late Majesty, Queen Victoria, chapter twenty-nine, intituled **An Act respecting Railways**, and the several Acts in amendment thereof; R.S. 1906, c. 37, sec. 2 (25).

(23) "registrar of deeds" or "registrar" includes the registrar of land titles, or other officer with whom the title to the land is registered; R.S. 1906, c. 37, sec. 2 (22).

(24) "registry of deeds," or "office of registrar of deeds," or other words descriptive of the office of the registrar of deeds, include the land titles office, or other office in which the title to the land is registered; R.S. 1906, c. 37, sec. 2 (23).

(25) "rolling stock" means and includes any locomotive, engine, motor car, tender, snow-plough, flanger, and every description of car or of railway equipment designed for movement on its wheels, over or upon the rails or tracks of the company; R.S. 1906, c. 37, sec. 2 (24).

Compare 30 and 31 Vic., c. 127, sec. 4 (Imp.).

(26) "Secretary" means the Secretary of the Board; R.S. 1906, c. 37, sec. 2 (26).

(27) "sheriff" means the sheriff of the district, county, riding, division, city or place within which are situated any lands in relation to which any matter is required to be done by a sheriff, and includes an under sheriff or other lawful deputy of the sheriff; R.S. 1906, c. 37, sec. 2 (27).

See sub-sec. 37, *infra*.

(28) "Special Act," **when used with reference to a railway**, means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, **whether heretofore or hereafter passed**, and includes,—

(a) all such Acts,

(b) with respect to the Grand Trunk Pacific Railway Company, **The National Transcontinental Railway Act, and any amendments thereto, and any scheduled agreements therein referred to, and**

(c) any letters patent, constituting a company's authority to construct or operate a railway, granted under any Act, and the Act under which such letters patent were granted **or confirmed**; R.S. 1906, c. 37, sec. 2 (28). Am.

The words "when used with reference to a railway," have been inserted with the effect, apparently, of excluding from the definition Special Acts relating to undertakings mentioned in e.g., secs. 368, 369, 373 and 375. See definition of "Special Act" in sec. 375. The words "whether heretofore or hereafter passed," in sub-sec. 28, are new.

Sub-sec. (b) in the former Act mentioned only one amendment (4 Geo. V., c. 24) of the N.T.R. Act.

The words "or confirmed" in sub-sec (c) are new.

Compare 36 & 37 Vic., cap. 48, sec. 2 (Imp.),

In the Toronto Viaduct Case, Chief Commissioner Mabey held that the fair meaning of the words "with special reference to such railway" is with respect to the "construction or operation" of the railway dealt with earlier in the same clause and that Stat. 56 Vic., cap. 48, validating the Esplanade Agreement was not a "Special Act" within the meaning of this clause. **G.T.R. and C.P.R. v. Toronto**, 11 C.R.C. 38. Affirmed 42 S.C.R. 613. On appeal it was held by the Privy Council that the Act in question was a Special Act within the meaning of sec. 3, but did not override the General Act, because the two Acts did not relate to the same subject-matter. **C.P.R. Co. v. City of Toronto and G.T.R.**, 12 C.R.C. 378; [1911] A.C. 461.

For definition of "Special Act" as applied to telegraphs and telephone, see sec. 375, subsections. 1 and 12 (c).

As to (c) compare R.S.C., 1906, cap. 79, sec. 5, which prohibits the incorporation of railway, telegraph or telephone companies by Dominion letters patent. Sub-section (c) applies to companies incorporated by letters patent of the Dominion before 2 Edw. VII., cap. 15, and such provincial companies as are subject to this Act for any purpose.

Dominion Statute, 58-59 Vic., ch. 66, confirming a municipal bylaw, held a Special Act within secs. 2 (28) and 3, **City of Hamilton v. T. H. and B. Ry. Co.**, 17 C.R.C. 370; 50 S.C.R. 128.

The language of the Railway Act, 1906, expresses an intention to preserve all powers conferred by previous Special Acts of incorporation upon companies within its scope, except where otherwise specifically provided, as e.g., in section 247 (g) of that Act.

Toronto and Niagara Power Co. v. Town of N. Toronto (1912) A.C. 834; 5 D.L.R. 43.

"Telegraph."

(29) "telegraph" includes wireless telegraph; 7-8 Ed. VII., c. 61, sec. 1 (d).

"Telegraph toll."

(30) "telegraph toll," or toll when used with reference to telegraph, means and includes any toll, rate or charge to be charged by **any** company to the public, or to any person, for the transmission of messages by telegraph; 7-8 Ed. VII., c. 61, sec. 1 (e).

The words "or toll when used with reference to telegraph" are new. The word "any" has been substituted for "the" before "company," to conform to the definition in sec. 2, s.s. 4.

See section 376, providing that after that section is brought into force as therein provided, telegraph toll in section 375 shall include charges for transmission of messages by marine, electric telegraph or cable system from, to or through Canada. Before the Parliamentary Committee revising the Act, the jurisdiction of the Canadian Parliament to control cable rates to and from Canada was stated to be based on Parliament's control of landing places of cables and the localities at which messages were fyled or received, so that the business might be prohibited unless the companies submitted to regulations governing carriage of messages beyond the three-mile limit and fixing the tolls therefor. The word "cable" was at first added to sub-section 29, but was afterwards struck out in view of the provisions of section 376.

"Telephone toll."

(31) "telephone toll," or toll when used with reference to telephone, means and includes any toll, rate or charge to be charged by **any** company to the public, or to any person, for use **or lease** of a telephone system or line, or any part thereof, or for the transmission of a message by telephone, or for installation and use **or lease** of telephone instruments, lines or apparatus, or for any service incidental to a telephone business; R.S., c. 37, sec. 2 (29).

The words "or toll when used with reference to telephone" are new. The word "any" has been substituted for "the" before "company" in the third line. See sec. 2, s.s. 4.

The words "or lease" (in two places) are new.

- (32) "toll," or "rate," when used with reference to a railway, means and includes any toll, rate, charge or allowance charged or made either by the company, or upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers, or the carriage, shipment, transportation, care, handling or delivery of goods, or for any service incidental to the business of a carrier; and includes also any toll, rate, charge or allowance so charged or made in connection with rolling stock, or the use thereof, or any instrumentality or facility of carriage, shipment or transportation, irrespective of ownership or of any contract, expressed or implied, with respect to the use thereof; and includes also any toll, rate, charge or allowance so charged or made for furnishing passengers with beds or berths upon sleeping cars, or for the collection, receipt, loading, unloading, stopping over, elevation, ventilation, refrigerating, icing, heating, switching, ferriage, cartage, storage, care, handling or delivery of, or in respect of, goods transported, or in transit, or to be transported; and includes also any toll, rate, charge or allowance so charged or made for the warehousing of goods, wharfage or demurrage, or the like, or so charged or made in connection with any one or more of the above-mentioned objects, separately or conjointly; 7-8 Ed. VII., c. 61, sec. 9, Am.
- "Toll and
"rate."

Section 2, sub-section 30, of the Act of 1906, for which the above sub-section 32 (omitting the words "when used with reference to a railway") was substituted by 7-8 Edw. VII., c. 61, sec. 9, read as follows: "Toll" or "rate" means and includes any toll, rate or charge made for the carriage of any traffic, or for the collection, loading, un-

loading or delivery of goods, or for warehousing or wharfage, or other services incidental to the business of a carrier. See 8 Vic., cap. 20, sec. 3 (Imp.).

Cartage charges by a transport company disallowed by the Board as being tolls within this definition authorised by a railway company and illegal because not included in a tariff duly filed. **Stewart v. C.P.R.**, 11 C.R.C. 197.

The Board has no jurisdiction over cartage companies as such, but can control cartage charges made by railway companies. **In re Cartage Tolls**, 14 C.R.C. 372.

Cartage is not a railway facility, although by sec. 2 (32) "toll" includes charges for cartage; it is not included in any tariff of tolls approved by the Board for line haul. It is a matter of contract between consignor and consignee who should pay the cartage charges, and the Board will not interfere. **In re Cartage Charges**, 19 C.R.C. 389.

Under sec. 358, the Board has jurisdiction over charges for carriage by water between Canadian points when such carriage is under control of a railway company. **Currie v. C.P.R.**, 13 C.R.C. 31.

Notwithstanding section 358, the Board has no power to regulate tolls for carriage wholly by water, by a steamship company subsidiary to a railway company. **Residents of Massett v. G.T.P.R. Co.**, 23 C.R.C. 121.

For definition of Express Tolls, see sub-section (9); telephone toll, sub-section (31), and telegraph toll, sub-section 30. See also sec. 375 (d).

"Traffic"

(33) "traffic" means the traffic of passengers, goods and rolling stock; R.S., 1906, c. 37, sec. 2 (31).

See sub-section (10), *supra*, and note thereto; see also sub-section (25). Compare 17 & 18 Vic., cap. 31, sec. 1 (Imp.), and 36 & 37 Vic., cap. 48, sec. 3 (Imp.).

"Train."

(34) "train" includes any engine, locomotive or other rolling stock; R.S., 1906, c. 37, sec. 2 (32).

In **Hollinger v. Canadian Pacific R.W. Co.**, 21 O.R. 705, it had been already held that an engine with tender moving reversely is a "train of cars" within the meaning of sec. 260 of 51 Vic., cap. 29, now (amended) sec. 421 (g), *infra*. This was affirmed 20 A.R. 244. In **Casey v. Canadian Pacific R.W. Co.**, (1888) 15 O.R. 574, it was

thought, though not definitely decided, that an engine and tender would under the corresponding section of R.S. C., 1886, cap. 109, be a "train of cars."

Semble, a hand-car moving upon the railway is not a "train" within the meaning of sec. 421 (g), *infra*. **Burtch v. Canadian Pacific Ry. Co.**, 13 O.L.R. 632; 6 Can. Ry. Cas. 461.

(35) "the undertaking" means the railway and works, of whatsoever description, which the company has authority to construct or operate; R.S., 1906, c. 37, sec. 2 (33). "Under-taking."

In England where a mortgage of the "undertaking" is given it means the undertaking as a going concern and the management cannot be interfered with by the mortgagees. **Gardner v. London, etc., Ry. Co.**, L.R. 2 Ch. 201. See **Wheatley v. Silkstone, etc., Co.**, 29 Ch. D. 715.

In **Phelps v. St. Catharines, etc., Ry. Co.**, 18 O.R. 581, it was said that "in railway parlance the undertaking has been defined to mean the complete work from which returns of money or earnings arise," see 19 O.R. 501. See also **Drummond v. South Eastern Ry. Co.**, 24 L.C. Jur. 276.

In **C.P.R. v. North Dumfries**, 6 C.R.C. 147, the Board of Railway Commissioners referred to this sub-section and held that a railway company might divert a highway for the purposes of a spur to a gravel pit, such a spur and its connections being part of "the undertaking" within section 118 of the Railway Act, 1903 (now section 162, *infra*).

The definition as it stands seems to give the word a much less extended meaning than customarily attaches to it when used in connection with e.g., mortgages to secure debentures of stock companies. As to the effect of a mortgage charge on the undertaking of a railway, see **Phelps v. St. Catharines, etc., Ry. Co.**, 18 O.R. 581, 19 O.R. 501; see also **Toronto General Trusts Corporation v. Central Ontario R.W. Co.**, 6 O.L.R. 1, 2 Can. Ry. Cas. 274; affirmed 8 O.L.R. 342; 4 Can. Ry. Cas. 328; affirmed (1905) A.C. 576; 74 L.J.P.C. 116.

(36) "working expenditure" means and includes,— "Working expenditure."
(a) all expenses of maintenance of the railway;
(b) all such tolls, rents or annual sums as are paid in respect of the hire of rolling stock let to the company; or in respect of property leased to or

- held by the company, apart from the rent of any leased line;
- (c) all rent charges or interest on the purchase money of lands belonging to the company, purchased but not paid for, or not fully paid for;
 - (d) all expenses of or incidental to the working of the railway and the traffic thereon, including all necessary repairs and supplies to rolling stock while on the lines of another company;
 - (e) all rates, taxes, insurance and compensation for accidents or losses, **including any such compensation payable under the provisions of any Act of the Parliament of Canada or of any provincial legislature providing for compensation to workmen for injuries or in respect of an industrial disease;**
 - (f) all salaries and wages of persons employed in and about the working of the railway and traffic;
 - (g) all office and management expenses, including directors' fees, and agency, legal and other like expenses;
 - (h) all costs and expenses of and incidental to the compliance by the company with any order of the Board under this Act; and
 - (i) generally, all such charges, if any, not hereinbefore otherwise specified, as, in all cases of English railway companies, are usually carried to the debit of revenue as distinguished from capital account; R.S. 1906, c. 37, sec. 2 (34).

The words in sub-sec. (e) from "including" to the end of the sub-section, are new.

Working expenditure includes wages (**Allan v. Manitoba, etc., Ry. Co.**, 13 C.L.T. 349); instalments and arrears of instalments of purchase price of rolling stock the property in which has not passed to the railway company, (**Re Eastern, etc., Ry. Co.**, 45 Ch. D. 367); necessary repairs (**Sage v. Shore Line Ry. Co.**, 2 N.B. Eq. 321, 2 C.R.C. 271); it does not necessarily include all expenses of operation and management incurred under an order of the Court (**Charlebois v. G.N.W. Central Ry. Co.**, 9 Man. L.R. 13, 11 Man. L.R. 135; nor in England the cost of defending an action to establish claims arising prior to the receivership (**Re Wrexham Mold, etc., Ry. Co.**, (1900), 1 Ch. 261; 2 Ch. 436).

Under the interpretation clauses of the Ontario Railway Act, "working expenses" was held to include a claim on a judgment for personal injuries: **Grobe v. Buffalo Ry. Co.**, 38 O.L.R. 272.

Apart from the statute, it appears that the Court has inherent jurisdiction to permit a receiver to make any necessary expenditures to save or properly maintain the property, but where all parties are not represented the necessity for such outlay must be very clear.

Greenwood v. Algesiras, etc., Ry. Co., (1894), 2 Ch. 205; **Securities, etc., Corporation v. Brighton**, 68 L.T. 249; **Ritchie v. Central Ontario Ry. Co.**, 7 O.L.R. 727, 10 O.L.R. 5, 3 C.R.C. 357, 4 C.R.C. 347.

(37) when any matter arises in respect of any lands which are not situated wholly in any one district, county, riding, division, city or place, and which are the property of one and the same person, "clerk of the peace," "justice" and "sheriff" respectively, mean any clerk of the peace, justice or sheriff for any district, county, riding, division, city or place within which any portion of such lands is situated. R.S., c. 37, s. 2 (35).

"Clerk of the peace."

"Justice"
"Sheriff."

Construing With Special Acts.

3. Except as in this Act otherwise provided,—

General
rules as to
construing.

- (a) this Act shall be construed as incorporate with the Special Act; and
- (b) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to override the provisions of this Act. R.S., c. 37, s. 3. Amended.

The words "except as in this Act otherwise provided" have been substituted for "subject to the provisions thereof" (Act of 1906), and the words "unless otherwise expressly provided in this Act," which prefaced the sub-sec. corresponding to the present sub-sec. (b) have been struck out.

See section 325 (5) which overrides this section, so far as it affects tolls, for three years from 7th July, 1919.

Special Act. These words are defined *ante*, sec. 2

(28). Since 2 Edw. VII., cap. 15, sec. 5 (D.), (now R. S.C., cap. 79, sec. 5), a railway company may only be incorporated by Act of Parliament and not by letters patent.

Section 27 of the Consolidated Railway Act, 1879, which was incorporated into the charter of the Canadian Pacific Railway Company by their Special Act, provided that actions for damages must be brought within six months. Under subsequent Railway Acts taking the place of the Act of 1879, the period of limitation was enlarged to one year. In a British Columbia case, **North-ern Counties Investment Trust v. C.P.R. Co.**, (13 B.C.R. 130; 7 Can. Ry. Cas. 164) it was argued for the defendants that the Act of 1879 by its incorporation into their Special Act, became part of their Special Act in such manner as not to be affected by subsequent general railway legislation, and that the provision as to a six months' limitation period over-rode the general provision of a one year period. Martin, J., upheld this contention; but it was held on appeal to the full court (by Hunter, C.J., and Clement, J., Irving, J., dissenting) that under R.S.C., cap. 1, sec. 20 (Interpretation Act), the subsequent general Railway Acts must be held to have been substituted for the Act of 1879 and successively incorporated in its stead into the defendant Company's charter, so far as not inconsistent with the Special Act itself.

When in a Special Act there are provisions inconsistent with the General Railway Act then in force it has been held even without an express statutory declaration that the provisions of the Special Act must prevail: **C.P.R. v. Major**, 1 B.C.R. 287; 13 S.C.R. 233, **Ontario, etc., Ry. Co. v. C.P.R.**, 14 O.R. 432. In the latter case the following useful general principles of construction are laid down:

- (a) When a company is incorporated by a Special Act and there are provisions in the Special Act as well as in the general Act on the same subject, which are inconsistent, if the Special Act gives in itself a complete rule on the subject the expression of that rule amounts to an exception of the subject matter of the rule out of the general act; but
- (b) When the rule given by the Special Act applies only to a portion of the subject, the Special Act may apply to one portion and the general act to the other.

In **Robertson v. G.T.R.** it was held by the Board (6 C.R.C. 494) affirmed by the Supreme Court of Canada

sub nom. G.T.R. v. Robertson, 39 S.C.R. 506, and again affirmed on appeal to the Privy Council A.C. (1909) 325, 9 C.R.C. 149, that a clause in the company's original Act of Incorporation (an Act of the old Province of Canada) requiring it to furnish third class passenger accommodation at two cents a mile was still in force as it had not been expressly repealed, and as this provision of the Special Act could not be regarded as having been impliedly repealed by subsequent general railway legislation. The case is instructive on the whole question of the effect of special and general acts affecting railway companies.

See also **Boards of Trade of Galt et al. v. G.T.R.**, 8 C.R.C. 195; **Toronto Viaduct Case**, 42 S.C.R. 613, 12 C.R.C. 378.

Express language of a Special Act held to prevail over incorporated sections of general Act. **Selkirk v. Windsor, etc., Ry. Co.**, 12 C.R.C. 279; 21 O.L.R. 109.

The Act, 56 Vic., c. 48, validating an agreement between the City of Toronto, the C.P.R. and the G.T.R., held a Special Act within this section, but not to override the general Act, because it did not "relate to the same subject matter:" **C.P.R. v. City of Toronto and G.T.R.**, 12 C.R.C. 378 (1911), A.C., 461; affirming (on somewhat different grounds) **G.T.R. v. City of Toronto**, 11 C.R.C., 38; 42 S.C.R. 613.

Dominion statute, 58-59 Vic., ch. 66, confirming a municipal by-law, held a Special Act within this section. **City of Hamilton v. T.H. & B. Ry. Co.**; 17 C.R.C. 370; 50 S.C.R. 128.

Under this section the statute 62 and 63 Vic., c. 5, being a Special Act specifying higher rates to Halifax than to Portland or St. John, was held to override the provisions of the general Railway Act against discrimination. **Halifax v. G.T.R.**, 12 C.R.C., 55.

Where agreements limiting tolls were made by a railway under powers in its provincial charter and were preserved by a Dominion Act declaring the railway for the general advantage of Canada, the Board held that it had no power to override them. **Hamilton Radial Ry. Co. v. City of Hamilton**, 23 C.R.C. 114.

The Act 60-61 Vic., c. 5, which, inter alia, limits tolls to be charged on the "Crow's Nest Line" is a special Act within the meaning of sec. 3, and limits the jurisdiction of the Board as to regulation of tolls; (see, now, however, sec. 325, sub-sec. 5); **Increase in Rates Case**, 22 C.R.C. 49.

Special Act
referring to
correspond-
ing provis-
ions.

4. If in any special Act heretofore passed, it is enacted that any provision of any general railway Act, in force at the time of the passing of such Special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such Special Act, extended, limited or qualified, the provisions of this Act relating to the same subject-matter, shall, unless otherwise provided in this Act, be taken to be excepted, extended, limited, or qualified, in like manner. R.S., c. 37, s. 4. Am.

This section in the Act of 1906 read as follows:

4. "If in any Special Act passed by the Parliament of Canada previously to the first day of February, one thousand nine hundred and four, it is enacted that any provision of the Railway Act 1888, or other general Railway Act in force at the time of the passing of such Special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such Special Act, extended, limited, or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified, in like manner."

The ambiguous words "corresponding provision," which appeared in former Acts, have been replaced by the words "provisions relating to the same subject matter."

Application of Act.

General Remarks on Sections 5 to 8.

At first the General Railway Act was only made applicable to companies thereafter incorporated, 14 & 15 Vic., cap. 51, secs. 1 and 2, and when the Dominion of Canada was created and its Parliament legislated for railways within its jurisdiction, it was directed that the General Railway Act should apply only to the Intercolonial Railway and to all railways which might thereafter be constructed under the authority of any special Act passed by the Parliament of Canada, and to all companies thereafter to be incorporated for their construction and working, 31 Vic., cap. 68, secs. 2, 3 and 4. Accordingly the Great Western Railway Co., which had been incorporated long before Confederation, was able to plead successfully that the last named statute and the amending Act of 34 Vic. (D.), cap. 43, sec. 20 (4) did not apply to it. *Scott v. G.W.R. Co.*, 23 U.C.C.P. 182. *Allan v. G.W.R. Co.*, 33 U.C.R. 483. But this ruling was first broken into by 38 Vic. (D.), cap. 24, sec. 4, which en-

acted that sec. 20 of 34 Vic., cap. 43, should apply to every railway company theretofore incorporated. See **Scarlett v. G.W.R. Co.**, 41 U.C.R. 211, at p. 214. And gradually by subsequent legislation all the provisions of the General Act became binding upon companies previously incorporated, even though they had been incorporated by special Acts of Parliament, which at the time were self contained.

By secs. 5 and 6, *infra*, the Act is to apply to all persons, railway companies and railways, (including, for the first time, Government railways, if so specified in any Act relating thereto), within the legislative jurisdiction of the Parliament of Canada, and also foreign railway companies owning, operating, controlling or running trains over railways in Canada described in sec. 6. By the British North America Act, 30 & 31 Vic., cap. 3 (Imp.), sec. 91, sub-sec. 29, all classes of subjects expressly excepted in the enumeration of the classes of subjects assigned exclusively to the legislatures of the Provinces were to be within the jurisdiction of the Dominion of Canada; and by sec. 92, sub-sec. 10, the following classes are excepted from Provincial jurisdiction, and therefore are within the exclusive jurisdiction of the Dominion of Canada;

- (a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province.
- (b) Such works as, although wholly situated within the Province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

Under the Dominion Railway Act of 1888, 51 Vic., cap. 29, sec. 306, certain railways, including the Intercolonial Railway, the Grand Trunk Railway, the Canada Southern Railway and the Canadian Pacific Railway, and some others which are now amalgamated with these companies were thereby declared to be works for the general advantage of Canada; and by sec. 307 it was enacted that they should be thereafter subject to the legislative authority of the Parliament of Canada, but that the provisions of any Act of the legislature of any Province of Canada, passed prior to May 25th, 1883, relating to such railway or branch line, and in force at that date, should remain in force so far as they were consistent with any Act of the Parliament of Canada thereafter passed. These

sections were originally enacted by 46 Vic., cap. 24, sec. 6 (D.).

Section 308 of the Dominion Railway Act, 1888, provided that the Governor-General, might, by proclamation or proclamations, confirm any one or more of the Acts of the Legislature of any Province passed before the passing of the statute relating to any railway which by Act of the Parliament of Canada had been declared to be a work for the general advantage of Canada; and after the date of such proclamation the Act or Acts thereby declared to be confirmed were to be confirmed, ratified and made as valid as though duly enacted by the Parliament of Canada.

By 63 & 64 Vic., cap. 23, sec. 1 (D.), it was enacted that street railways and tramways, while declared to be subject to such provisions of the Railway Act as had reference to railway crossings, junctions, fences, penalties and statistics should not by reason of the fact of the crossing or connecting with the railways mentioned in sec. 306, of 51 Vic., cap. 29, be considered to be works for the general advantage of Canada, nor subject to any other provisions of that act; and special reference was made to electric railways passing over the property of Queen Victoria Niagara Falls Park, which had been previously excepted by 56 Vic., cap. 27, sec. 3 (D.). These sections are not found in the present statute (though provincial railways which cross or connect with railways subject to this Act are by section 8 made subject to certain provisions of it) and the question whether any company is generally within the jurisdiction of the Parliament of Canada must now depend upon whether

- (a) Its lines are lines between two or more Provinces or extending beyond the limits of a Province, or
- (b) Whether they are declared by any special Act to be a work for the general advantage of Canada or for the advantage of two or more Provinces.

Probably the railways mentioned in sec. 306 of the former consolidation all remain subject to the jurisdiction of the Parliament of Canada, because they are part of a system connecting two or more Provinces, or extending beyond the limits of a Province, or the company with which they have amalgamated has been declared by Special Act to be a work for the general advantage of Canada. If a railway lying wholly within the limits of one Province has maintained its separate organization or, though crossing a railway within the jurisdiction of the

Dominion of Canada, lies wholly in one province, an interesting question may arise whether it is now subject to the Dominion Railway Act or has become subject to the provisions of the Provincial statutes only.

Difficult constitutional questions frequently arise out of these and similar enactments in considering their effects upon

- (a) The general law as administered in any of the Provinces.
- (b) Provincial legislation, and
- (c) Other persons or corporations with whom the railway comes in contact.

A short summary of the effect of the cases upon these three points now follows:

- (a) Effect of Dominion railway legislation upon general law in the province.

In **C.P.R. v. Roy** (1902) A.C. 220, 1 C.R.C. 170, it was argued, and indeed decided by Bosse, J., delivering judgment of the Court of King's Bench in Quebec that a statute conferring upon a railway company the power to use fire, ought not to be so interpreted as to result in an infraction or invasion of the Quebec Civil Law, under which a railway company has always been held liable for fire set out by its locomotives, even though no negligence were proved. In other words, that court declined to hold that Parliament legislating within its jurisdiction is supreme over the civil law, but this contention was disaffirmed by the Privy Council in the same case reported 1 C.R.C. 196, and it was there held that Parliament so legislating upon matters assigned to it was supreme over the civil law as well as over the common law as administered in the other Provinces and this notwithstanding the words "under the laws in force in the province" which appeared in sec. 288, of 51 Vic., cap. 29 (D.). The corresponding section, 391 (4), of the present Act omits these words.

It was explained by Sir Charles Fitzpatrick, then Minister of Justice, later Chief Justice of the Supreme Court, in 8 Rev. Leg. N.S. 306, that the decision of the Quebec judges appeared to have been based upon a misapprehension of the difference between the limited powers of the old French Parliament and the absolute authority of the Parliaments of Great Britain and similarly of Canada when the latter legislated upon subjects within the general scope of their jurisdiction; see also **Bell v. Westmount**, Q.R. 15 S.C. 580, 9 Q.B. 34.

In **Veilleux v. Atlantic, etc., Ry. Co.**, 12 C.R.C. 91; Q. R. 39 S.C. 127, the provisions of the Railway Act, 1888, as to formalities in connection with issue of bonds were held to override the Quebec civil law; and the relation of Dominion legislation to the law of property and civil rights in the province was discussed, citing **Cushing v. Dupuy**, 5 App. Cas. 409; **Tennant v. Union Bank** (1894), A.C. 31.

(b) Effect on provincial legislation.

The effect of legislation declaring a railway to be a work for the general advantage of Canada upon prior or subsequent provincial legislation has been considered in a number of cases.

In **Western Counties Ry. Co. v. Windsor etc., Ry. Co.**, 7 A.C. 178, it was argued that the Dominion of Canada had no power under the sections of the B.N.A. Act already mentioned, to pass legislation which would have the effect of setting aside an agreement validated by provincial statute. Their Lordships, while finding it unnecessary to decide this point, stated that whether the Parliament of Canada had or had not power to impair the obligations of legislative contracts of this character any act which purported to do so would be strictly construed and they would strive as far as possible to reconcile the two statutes rather than allow a subsequent Dominion statute to alter the terms of an agreement duly sanctioned by the provincial legislature. This case was followed in **Commissioner of Public Works (Cape Colony) v. Logan**, (1903), A.C. 355. Where also a railway is incorporated under provincial legislation designed to connect with a similar undertaking in another country or province the Dominion Parliament has no power on that account to legislate respecting the provincial undertaking unless it first declares that the same is a work for the general advantage of Canada and the provincial legislation is valid even though the result of carrying it out will be to effect a connection with a similar work in another country or province. **European, etc., Ry. Co. v. Thomas**, 14 N.B.R., 42, 2 Cartwright 439; and so also where a company has been incorporated by Dominion statute for the purpose of establishing telephone lines in the several provinces, but not of connecting two or more provinces, and where the undertaking was not declared to be for the advantage of Canada or two or more provinces it was held that the Dominion statute, so far as it professed to confer a right to erect poles in the streets of cities and towns, was invalid: **Regina v. Mohr**, 7 Q.L.R., 183 2 Cartwright 257. But where such a telephone company is expressly declared to be a work for the general advantage of Canada

it may erect poles in the streets of cities and towns without obtaining the prior consent of the municipality as required by Provincial Municipal Legislation: **City of Toronto v. Bell Telephone Company**, 3 O.L.R. 465; 6 O.L.R. 335, (1905), A.C. 52; and the Privy Council in their judgment disapproved of **Regina v. Mohr**, *supra*. And even though the company should have previously confined the exercise of its powers to one province only, it is nevertheless a Dominion Company and may fully exercise the powers it derives from the Dominion in that one province: **Colonial Building, etc., Association v. Attorney-General, Quebec**, 9 A.C. 157, at p. 165.

A Dominion Railway is, however, subject to any provincial statutes governing the general administration of justice in that province so long as those statutes do not affect its road-bed or the operation of the railway. For instance, most of the provisions of the Workmen's Compensation Acts of the various provinces apply to a Dominion railway: **Canada Southern Ry. Co. v. Jackson**, 17 S.C.R. 316, and such a company is liable for taxation under various provincial laws: **C.P.R. Co. v. Notre Dame de Bonsecours**, Q.R., 7 Q.B. 121, (1899), A.C. 367. This case well illustrates the difference between provincial legislation affecting the construction or operation of a railroad and provincial legislation affecting merely the administration of the law and the civil rights and liabilities of railroad companies. See particularly the remarks of Lord Watson (1899), A.C. at p. 372, which are quoted 2 C.R.C., pp. 266 and 267. See also **City of Quebec v. G.T.R.**, 30 S.C.R. 73.

It was held in the Province of Quebec that where a provincial statute (56 Vic., cap. 36, Q.), provided for the sequestration of a railway that statute dealt with procedure merely and was applicable to a Dominion line. As sequestration would have the effect of interfering with the actual roadbed and railway appliances it may be doubted whether this case would be followed in other provinces. Two judges, Hall and Wurtelle, JJ., dissented: **Baie de Chaleur Ry. Co. v. Nantel**, Q.R. 9 S.C. 47, Q.R., 5 Q.B., 64. But it has also been held in Quebec that the land of a railway cannot be sold for taxes: **Montreal, etc., Ry. Co. v. Longueil**, Q.R. 9 S.C. 3; reversed Q.R. 10, S.C. 182, on the ground that a wharf on which no rails are laid is not an integral part of the railway. The Dominion of Canada also has power to legislate affecting property and civil rights as applied to a Dominion railway and therefore it has been held in **Vogel v. G.T.R.** and **Morton v. G.T.R.**, 2 O.R. 197, 10 A.R. 162,

and 11 S.C.R. 612, that the Federal Parliament has power to declare that contracts made by railway companies against the result of their own negligence shall be invalid.

It has also power to enact as in 4 Edw. VII., cap. 31 that no action by an employee for damages for personal injury shall be barred by conditions imposed by the railway company. **G.T.R. v. Attorney-General**, 36 S.C.R. 136; 5 C.R.C. 1, affirmed by the Privy Council, 76 L.J.P. C. 23 (1907), A.C. 65; 7 C.R.C. 472. So also the Dominion Parliament may legislate upon questions of procedure where they affect Dominion railways: **Lamont v. C.P.R.**, 5 Terr. L.R. 60; 3 C.R.C. 124; **Findlay v. C.P.R.**, 2 C.R.C. 380, and see notes at page 383; and **Zimmer v. G.T.R.**, 19 A.R. 693.

And though municipal institutions are subjects of provincial jurisdiction, federal legislation imposing burdens on municipalities by compelling them to pay the cost of works necessary for protection of the public is *intra vires*, if ancillary to through railway legislation, **City of Toronto v. C.P.R.** (1908), A.C. 54; 7 C.R.C. 282.

A provincial statute which will interfere with the physical condition of a Dominion railway is unconstitutional: **C.P.R. v. Notre Dame de Bonsecours**, *supra*. In **re Alberta Railway Act**, 15 C.R.C. 213, 48 S.C.R. 9. And so a provincial statute enacting that every railway company operating under the authority of the Dominion Act which fails to erect fences alongside of its track shall be liable in damages for cattle killed or injured by its trains or engines was declared to be *ultra vires*: **Madden v. Nelson, etc., Ry. Co.**, 5 B.C.R. 541 (1899), A.C. 626, and in **G.T.R. v. Therrien**, 30 S.C.R. 485, it was held that provincial legislation in respect of farm crossings or the structural conditions of a Dominion railway was *ultra vires*.

Provincial legislation imposing liability on Dominion Railways as to fires caused by their engines was held *ultra vires*, **C.P.R. v. Reg.**, 39 S.C.R. 476, 6 C.R.C. 421; 7 C.R.C. 176. A municipal by-law, passed under authority of a provincial statute, purporting to regulate smoke emission from locomotives, held not applicable to a Dominion railway, per Middleton, J., **Rex v. C.P.R.**, 33 O.L.R. 248; affirmed on other grounds, 19 C.R.C. 311, 25 D.L.R. 444. So also the Ontario Ditches and Watercourses Act, R.S.O. 1887, cap. 199, was held to be inapplicable to a Dominion Railway Company: **Miller v. G.T.R.**, 45 U.C.R. 222; and this principle was adopted in **McCrimmon v. Township of Yarmouth**, 27 A.R. 636. The provisions of the Ontario Railway Accidents Act, 44 Vic., cap. 22,

afterwards R.S.O. 1897, cap. 266, repealed by the Ontario Railway Act, 1913, were held not to affect a Dominion railway, **Monkhouse v. G.T.R.**, 8 A.R. 637; **Clegg v. G.T.R.**, 10 O.R. 708. Section 5 of the Workmen's Compensation Act, formerly R.S.O. 1899, c. 160 (now repealed) requiring that railway frogs should be packed during certain months of the year was held not to apply to a Dominion railway and this notwithstanding the fact that the general provisions of that statute creating a liability for injuries received by a workman in the employ of the master are made applicable as above mentioned: **Washington v. G.T.R.**, 24 A.R. 183. This decision was reversed upon the construction of the Dominion Railway Act, 51 Vic., cap. 29, sec. 262, but the view of the Court of Appeal in their report of the case was not attacked: see 28 S.C.R. 184, (1890) A.C. 275. So also the provincial legislature cannot confer upon a provincial railway power to cross a Dominion line except subject to the provisions contained in the Dominion Railway Act: **C.P.R. v. Northern Pacific Ry. Co.**, 5 Man. L.R. 301, nor does a provincial statute for the regulation of public franchises apply to a railway declared to be a work for the general advantage of Canada: **Attorney-General, ex rel. v. V., V. and E. Ry. Co.**, 9 B.C.R. 338; 3 C.R.C. 137; see also **Yale Hotel Co. v. same defendants**, 9 B.C.R. 66, 3 C.R.C. 108. In **Breeze v. Midland Ry. Co.**, 26 Gr. 225, it was held that a mechanic's lien could not be enforced against a railway and in **King v. Alford**, 9 O.R. 643 and **Larsen v. Nelson and Fort Sheppard Ry. Co.**, 4 B.C.R. 151, it was suggested, though perhaps not definitely decided, that such a lien created by virtue of a provincial statute would not attach against a Dominion railway. Certainly on principle such a lien should not be enforced, for it would necessarily result in a sale of the undertaking, something that no provincial statute could authorize.

In **Crawford v. Tilden**, 13 O.L.R. 169; 14 O.L.R. 572; 6 C.R.C. 300, 437, it was held by a Divisional Court and affirmed by the Court of Appeal for Ontario that a mechanic's lien filed in one county could not be enforced by sale of either the whole or any part of a railway under federal jurisdiction which passed through more than one county. This decision was followed by a Divisional Court in **Johnston & Carey Co. v. C.N.R.**, 24, C.R.C. 294; 44 O.L.R. 533; 47 D.L.R. 75, in which it was contended that the lands in question were surplus lands and that therefore the case was distinguishable, but the Court held otherwise. The judgment of Meredith, J.A., and some remarks of the other judges in **Crawford v. Tilden**

indicated that the decision hinged rather on the impossibility of enforcing the lien in question without selling piecemeal and so disintegrating the railway and defeating the object of the federal legislation, than on the constitutional proposition that provincial legislation of the nature of the Mechanics' Lien Act can not be made to apply to a Dominion railway. And, quaere, whether if a railway declared by Parliament to be for the general advantage of Canada, lay wholly within one county, or if under provincial legislation a mechanic's lien could be filed against the whole railway (passing through two or more counties but lying wholly within the province) a mechanic's lien could not be enforced by sale of the undertaking as a whole having in view the provisions of section 150 of the Railway Act. See **Central Ontario Ry. Co. v. Trusts & Guarantee Co.** (1905), A.C. 576; 74 L.J. P.C. 116, cited by Meredith, J.A. In any event, the general principle is clear that provincial legislation of this nature cannot confer rights, whose enforcement would be inconsistent with the federal legislation providing for the building and maintenance of the road.

The Court of Appeal for Ontario in **Re Grand Junction R.W. Co. and Peterborough**, 6 A.R. 339, stated that the Dominion Parliament has no power to incorporate or legislate in respect of a railway company unless it also declare that the same is a work for the general advantage of Canada or two or more provinces. This point is not dealt with by the Supreme Court on appeal from the decision of that Court, 8 S.C.R. 76, 13 A.C. 136.

(c) The effect on persons or corporations other than the railway or their undertaking declared to be for the advantage of Canada.

In **Bell Telephone Co. v Toronto**, 3 O.L.R. 465, 6 O.L.R. 335, and (1905), A.C. 52, referred to, *supra*, it was decided that though there were provisions in the Municipal Act of Ontario vesting in cities control over their own streets, these provisions did not prevent a telephone company declared to be a work for the general advantage of Canada from proceeding to place their poles and wires in streets of the city, notwithstanding the latter's opposition, provided of course that they executed their works in the manner prescribed by the Dominion Statutes which affect them.

So also it has been held that a railway may under authority obtained from the Dominion of Canada construct a railway through lands owned by the Crown in the right of a province: **Booth v. McIntyre**, 31 U.C.C.P.

183. **Attorney-General v. C.P.R.** (1906), A.C. 204. In **C.P.R. Co. v. Township and County of York**, 27 O.R. 559, 25 A.R. 65, 1 Can. Ry. Cas. 36, 47, the question was discussed as to how far other corporations or persons were bound by the orders of the Railway Committee of the Privy Council for which the Board of Railway Commissioners has now been substituted. Though there was a division of the Judges it may be stated that the effect of this case is to hold that not only could the Dominion Parliament empower a railway company to cross highways within the province but it could compel municipalities interested in these highways to contribute towards the cost of the works necessary for the protection of the public in using them. This was based, perhaps, to some extent upon the fact that the municipalities had attended before the Railway Committee and therefore had attorned to their jurisdiction, but the effect of the decision is that not only railways but other persons or corporations are bound by the orders of the Railway Committee; and therefore by those of the present Board of Railway Commissioners while acting within the scope of the powers conferred upon them by the statute. See **City of Toronto v. C.P.R.**, *supra*.

This principle is now fully established, as to works constructed with relation to railway requirements or to conditions created by railway construction or operation. See **B.C. Electric Ry. Co. v. V., V. and E. Ry. Co.**, 15 C.R.C., 237; reversed 18 C.R.C. 287 [1914], A.C. 1067; 19 D.L.R. 91 and note on that case, 18 C.R.C. 296.

See also the Privy Council's judgment in **Toronto Ry. Co. v. City of Toronto**, 46 O.L.R. 452, in which the principle of the judgment in the **B.C. Electric Case** is explained.

In **G.T.R. v. City of Toronto**, 32 O.R. 120, Meredith, J., decided in effect, that though the provincial legislature has power to authorise a municipality to acquire and make any street and to provide how and upon what terms it may be acquired and made, that power is subject to the supervention of federal legislation respecting works and undertakings such as the railway in question and such legislation might confer upon any person or public body the power to determine in what circumstances and how and upon what terms such a street might be acquired for railway purposes; and that legislation affecting railways within the jurisdiction of the Parliament of Canada may confer power upon another body to impose terms upon municipalities or other persons other than railway com-

panies, upon which they must part with their control of streets or other property.

But it was further held in that case that the Dominion Parliament had not conferred upon the Railway Committee of the Privy Council power to make the terms which they had there made, subject to which a street was to be altered and the expenses of alteration paid partially by the railway company and partially by the municipality. See also secs. 256 and 257 *infra*.

So also the Dominion Parliament had power to pass the Statute 5 6Vic., cap. 27 (D), sec. 1 (see sec. 252, *infra*), enacting that no railway should be crossed by an electric railway except with the approval of the Railway Committee, and as a result of that power an electric railway created by provincial act, which expressly prohibited crossing a Dominion railway at grade might, with the approval of the Railway Committee, acting under the Dominion statute, cross the railway at grade notwithstanding the prohibition contained in its provincial charter: **G.T.R. v. Hamilton, etc., Ry. Co.**, 29 O.R. 143.

But sec. 8 (b) of the Act of 1903, declaring provincial railways connecting with or crossing Dominion railways to be subject to the provisions of the Act relating to through traffic, was held *ultra vires* of Parliament. **City of Montreal v. Montreal St. Ry. Co.**, 13 C.R.C. 541; [1912] A.C. 333; affirming **Montreal St. Ry. Co. v. Montreal**, 11 C.R.C. 203; 43 S.C.R. 197.

Where a railway created by an Ontario charter or by subsequent federal legislation was declared to be a work for the general advantage of Canada, it was decided that thereafter the provisions of the Dominion Railway Act applied to expropriation proceedings taken by the railway; **Darling v. Midland Ry. Co.**, 11 P.R. 32; **Barbeau v. St. Catharines etc., Ry. Co.**, 15 O.R. 586; **Bowen v. Canada Southern Ry. Co.**, 14 A.R. 1; see also on this subject the notes upon the case of **Re Columbia & Western Ry. Co.**, 2 C.R.C. 264, at pp. 265 to 270.

To what
persons,
companies
and railways
applicable.

5. This Act shall, subject as herein provided, apply to all persons, railway companies and railways, within the legislative authority of the Parliament of Canada, whether heretofore or hereafter, and howsoever, incorporated or authorised, except Government railways, to which however it shall apply to such extent as is specified in any Act referring or relating thereto. R.S., c. 37, s. 5.

This section in the Act of 1906 read as follows:

"5. This Act shall, subject as herein provided, apply to all persons, companies and railways, other than Government railways, within the legislative authority of the Parliament of Canada."

Under the Railway Act of 1888, the provisions relating to the incorporation organization and internal management of railways, and the duties of directors, officers and shareholders, *inter se*, comprised in secs. 32 to 89 inclusive, of that Act, did not apply to every railway but only to those whose authority to construct and operate were derived from the Dominion Parliament and accordingly these sections would not apply to railway companies whose authority on these points was derived from legislation earlier than confederation. But all these last named railways would be governed by the corresponding provisions of the present act; the effect of secs. 4, 5 and 7 would appear to be to abrogate any provisions of pre-confederation special acts or acts of provincial legislatures so far as they may be inconsistent with Dominion legislation upon a cognate subject, while on the other hand, post-confederation special acts of the Parliament of Canada would still over-ride the general provisions of this statute.

In determining provincial or Dominion jurisdiction over a company with a federal charter giving powers to operate beyond the limits of a province, the test is not whether the powers have been exercised but whether they have been conferred. *Kerley v. L. & L. E. Ry. Co.*, 15 C.R.C. 337; 13 D.L.R. 365; 28 O.L.R. 606.

The Board has power, under section 170 or section 200 of the Act to authorise expropriation of lands of a provincial by a Dominion railway: *Lachine etc., Ry. Co. v. Montreal Tramways Co.*, 18 C.R.C. 133; *Canadian N.W. Ry. Co. v. C.P.R. Co.*, 16 C.R.C. 105; 13 D.L.R. 624. But not the taking of them under section 193.

Montreal Tramway Co. v. Lachine, etc., Ry. Co., 18 C.R.C. 122; 50 S.C.R. 84.

"The settled practice of the Board has been to interpret the Act as applying merely to railways subject to Dominion jurisdiction, apart from specific sections in which provincial railways are dealt with"—per Drayton, Chief Commissioner, *Lachine Co. v. Montreal Co.*, *supra*.

See notes on these cases, 18 C.R.C., 144.

See notes on sec. 2, sub-sec. 4 (definition of "company"), *supra*.

The Board has jurisdiction to compel a provincial railway, in the public interest, to cross a Dominion railway by a double, instead of a single track. **City of London v. London St. Ry. Co.**, 19 C.R.C. 436.

It is not the function of the Board to decide whether a section of the Railway Act giving it jurisdiction over a provincial company is *intra vires* of Parliament.

Auger v. G.T.R. Co. and C.P.R. Co., 19 C.R.C. 401.

The Board has no power to authorise a provincial railway company to take lands and use tracks of a Dominion company. **St. John Ry. Co. v. C.P.R.**, 17 C.R.C. 334.

A provincial act purporting to authorise a provincial railway to take lands of a Dominion railway "so far as the taking does not unreasonably interfere with construction or operation" of the latter; held *ultra vires*. **Attorney-General for Alberta v. Attorney-General for Canada**, 19 C.R.C. 153; [1915] A.C. 363.

Government Railways—The Confederation of the British North American provinces into the Dominion of Canada brought about—in fact was expressly made to depend upon—the construction of two important railways. The Intercolonial was declared to be essential to the assent of Nova Scotia and New Brunswick to the original Union; and the Canadian Pacific was a condition of the subsequent adhesion of British Columbia.

With these two systems—both national—Parliament has followed two entirely different lines of policy. Though a part of the Canadian Pacific was constructed by the Government, it was transferred to a company chartered for the purpose of building and operating the road, and although inaugurated for political reasons as a public work the railway and its allied and subsidiary interests have attained their present phenomenal development under private ownership and control.

As to the Intercolonial, on the other hand, the Act which authorised it (31 Vic., c. 13; 1867), provided that

"There shall be a railway constructed connecting the port of Riviere du Loup with the line of railway leading from the city of Halifax at or near the town of Truro; and such railway shall be styled and known as 'the Intercolonial Railway.'

The said railway shall be a public work belonging to the Dominion of Canada."

Commissioners were appointed with power to make explorations and surveys, acquire lands and construct the

railway, exercising for that purpose all the powers conferred by Parliament upon railway companies. Upon completion of the railway, or part of it, the Governor-in-Council was to make suitable arrangements for operating it, pending further directions by Parliament.

By section 2 of the general Railway Act of 1868, the provisions of that Act were made to apply to the Intercolonial so far as applicable and not inconsistent with the Special Act providing for its construction.

In 1874, by the Act 37 Vic., c. 15, the Board of Commissioners was abolished and the railway was declared to be vested in Her Majesty and under the control and management of the Minister of Public Works, to whom all the powers and duties of the Commissioners were transferred. The Department of Public Works was divided in 1879 (42 Vic., c. 7), into two, one of which was styled the Department of Railways and Canals and assumed control of the railways theretofore managed by the Public Works Department.

In the meantime, by the terms under which Prince Edward Island entered Confederation (Order-in-Council 26th June, 1873), the Prince Edward Island Railway had become the property of Canada.

Certain lines built by the provinces of New Brunswick and Nova Scotia and vested in the Dominion by the British North America Act, were declared to form part of the Intercolonial by the Act 38 Vic., c. 22 (1875); in 1880 the acquisition of the Grand Trunk line between Riviere du Loup and Hadlow, authorised by 42 Vic., c. 11, was carried into effect by 43 Vic., c. 8. Various other accretions and extensions have taken place from time to time, including, in 1899, the extension of the Intercolonial to Montreal by leasing the Drummond County Railway from Chaudiere to Ste. Rosalie and making an agreement with the Grand Trunk for joint use of a portion of its tracks 62-63 Vic., c. 5).

In addition, certain privately owned railways in Quebec and the Maritime Provinces have been acquired by the Government at various times by lease or purchase.

In 1881, an Act was passed (44 Vic., c. 25) "to amend and consolidate the laws relating to Government Railways," which took the Government Railways out of the general Railway Act, and was declared to apply to all railways vested in Her Majesty and under the management of the Minister of Railways. This Act appeared, with amendments, in the Revised Statutes of 1886 and 1906; and the general Railway Act of 1906 was express-

ly stated (sec. 5) not to be applicable to Government Railways.

By 54-55 Vic., c. 50 (1891), all railways and all branches and extensions thereof and ferries in connection therewith, vested in Her Majesty and under the control of the Minister of Railways in Quebec, New Brunswick and Nova Scotia, were declared to form part of the Intercolonial.

In 1903 a step of the utmost importance was taken by Parliament in the passing of the Act 3 Edw. VII., c. 71, providing for "the construction of a National Transcontinental Railway, to be operated as a common railway highway across Canada from ocean to ocean, and wholly within Canadian territory;" and confirming an agreement between the Government and the Grand Trunk Pacific Railway Company (incorporated during the same Session), under which the Government was to construct the Eastern Division of the new road (Moncton to Winnipeg) and the Company was to construct the Western Section (Winnipeg to the Pacific), to lease the Eastern Section from the Government and to operate the whole line. The Grand Trunk Railway Company of Canada assumed large financial responsibilities in connection with this undertaking, which afterwards caused it much embarrassment and led, first, to the operation of the Grand Trunk Pacific Railway System by the Minister of Railways as a receiver (See 9-10 Geo. V., c. 22), and finally to the Act, 10 Geo. V., c. 17 (1919: second session) under which not only the Grand Trunk Pacific, but the Grand Trunk Railway System itself, was (subject to the approval of the Grand Trunk shareholders, which has since been given) to be brought under Government control by acquirement of stock. An arbitration to determine the value of the stock is now (September, 1921) in progress. See 11-12 Geo. V., c. 9.

In 1919, also, following the acquisition by the Government of control of the Canadian Northern Railway Company and subsidiary companies, an Act was passed (9-10 Geo. V., c. 13) to incorporate the Canadian National Railway Company, a device for Government ownership and operation of the numerous Canadian Northern lines in the various provinces, all of which, together with the Canadian Government Railways, were to be held and operated by the new Company as a National railway system. Provision was made by the Act (sec. 11) for the transfer to the new company of the management of such railways vested in His Majesty or of stock held by His

Majesty therein as might be designated from time to time by Order-in-Council; and power was given to the Governor-in-Council (Sec. 12) to transfer to the Company the whole or part of the stock of companies in which the Government had acquired the entire stock or a controlling interest.

The provisions of the general Railway Act (with certain specified exceptions) were made applicable to the new company and its undertakings (Sec. 13) and by Sec. 14 the provisions of the Railway Act as to operation (but not construction or maintenance) of a railway were made applicable to such of the Canadian Government Railways, while under operation and management by the Company, as would, but for the Act, be subject to the Government Railways Act.

6. The provisions of this Act shall, without limiting the effect of the last preceding section, extend and apply to,—

Application
to—

(a) every railway company incorporated elsewhere than in Canada and owning, controlling, operating or running trains or rolling stock upon or over any line or lines of railway in Canada either owned, controlled, leased or operated by such company or companies, whether in either case such ownership, control, or operation is acquired by purchase, lease, agreement or by any other means whatsoever; 1909. c. 32, s. 11.

Foreign
companies.

(b) every railway company operating or running trains from any point in the United States to any point in Canada. 1909, c. 32, s. 11. Am.

Companies
running
trains into
Canada.

(c) every railway or portion thereof, whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada, or by a company operating a railway wholly or partly within the legislative authority of the Parliament of Canada, whether such ownership, control, or first mentioned operation is acquired or exercised by purchase, lease, agreement or other means whatsoever, and whether acquired or exercised under authority of the

Railways
deemed to be
works for
general
advantage
of Canada.

Parliament of Canada, or of the legislature of any province, or otherwise howsoever; and every railway or portion thereof, now or hereafter so owned, controlled, leased or operated shall be deemed and is hereby declared to be a work for the general advantage of Canada.

Railways excepted from those deemed to be for the advantage of Canada.

(2) The provisions of paragraph (c) of this section shall be deemed not to include or apply to any street railway, electric suburban railway or tramway constructed under the authority of a provincial Legislature, and which has not been declared to be a work for the general advantage of Canada otherwise than by the provisions of the said paragraph. Provided that this subsection shall not affect or come into force with respect to any street railway, electric suburban railway or tramway in the province of British Columbia until the expiration of one year from the passing of this Act. 1920, c. 65, s. 1.

This section was not in the Act of 1906. As passed in 1909, it was as follows:

"The provisions of this Act shall apply to:

- (a) Any and all railway companies incorporated elsewhere than in Canada and owning, controlling, operating or running trains or rolling stock upon or over any line or lines of railway in Canada, either owned, controlled, leased or operated by such railway company or companies, whether in either case, such ownership control or operation is acquired by purchase, lease, agreement, control of stock or by any other means whatsoever.
- (b) Any and all railway companies operating or running trains from any point in the United States to any point in Canada."

In **Board of Trade of Dawson v. White Pass and Yukon Ry. Co.**, 9 C.R.C. 190, the Board held that under this section it could require foreign companies to file a joint tariff under section 339 for a route from Skagway in Alaska, through a portion of British Columbia to White Horse in the Yukon Territory. See also **British American Oil Co. v. G.T.R.**, 9 C.R.C. 178, 43 S.C.R. 311.

The Board will exercise jurisdiction under sub-section (a) of this section to compel foreign companies operating in Canada to provide proper train service and facilities. **Stewart v. Napierville Jn. Ry. Co.**, 12 C.R.C. 399.

The Board has no extra territorial jurisdiction, not even to compel the filing of through passenger tariffs by Canadian railways from frontier points in the United States to points in Canada. **C.N.R. Co. v. G.T.R. and C.P.R. Cos.**, 10 C.R.C. 139.

Sub-section (c) of this section is new and is said to have been passed with special reference to the case of the Quebec Central Railway. See **In Re Quebec Central Ry. Co.**, 15 C.R.C. 105. It will give the Board more effective jurisdiction over composite railway systems, some parts of which are of Dominion and some of provincial incorporation. There may be some question as to what measure of "control" of a provincial or Dominion railway is necessary to bring into effect the declaration that the former is for the general advantage of Canada. Would purchase of a majority of the shares of its stock have that effect? The words "control of stock" which were in the Act of 1909, after the word "agreement" have been omitted. The expression "partly within the legislative authority of Parliament," is of doubtful meaning. Certain provincial railways are "partly" (as to crossings and connections) within the legislative authority of Parliament, as exercised, e.g., in section 8; and all provincial railways and the companies operating them are subject to Dominion jurisdiction in certain other respects.

It would appear that a short lease of a provincial by a Dominion road, would bring the former under Dominion jurisdiction; and no provision is made for restoring it to provincial control upon the expiration of the lease.

During the discussions of the House of Commons Committee revising the Act, strong objection was taken to sub-section (c) as being unfair to provinces which had incorporated and subsidized railways, which under this sub-section by reason of being leased or operated by a federal road might pass entirely out of their control. The Committee was of opinion that control of rates and uniformity of equipment, maintenance and operation were sufficient reasons for enacting that railways owned, controlled, leased or operated by federal railways should be declared to be works for the general advantage of Canada and thereby pass under federal control. The section in this form was supported by representatives of the railway employees to ensure uniformity of equipment and operating rules, thus ensuring greater safety of operation.

Railways
declared to
be for
general
advantage
of Canada.

Special Act.

7. Where any railway, the construction or operation of which is authorised by a Special Act passed by the legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway and to the company constructing or operating the same, to the exclusion of such of the provisions of the said Special Act as are inconsistent with this Act, and in lieu of any general railway Act of the province, R.S., c. 37, s. 6.

The enactment of this section made it clear that after a declaration that a railway is for the general advantage of Canada it must refer exclusively to the Dominion Act for a definition of its powers, duties and obligations in any case in which the provincial and Dominion legislation clash even though it had been incorporated by and had been previously proceeding under powers conferred upon it by a Provincial Legislature. Previously this was not the case, see **Darling v. Midland Ry. Co.**, 11 P.R. 32; **Re Barbeau and St. Catharines, etc., Ry. Co.**, 15 O.R. 583; **Barbeau v. St. Catharines, etc., Ry. Co.**, 14 A.R. 1, per Osler, J.A., at p. 10; **Toronto Belt Line Ry. Co. v. Lauder**, 19 O.R. 607, where under consolidations, prior to 1903, a contrary view had been taken. The principle of the present enactment had already been adopted in British Columbia in **Re Columbia and Western Ry. Co.**, 2 C.R.C. 264.

The mere fact that a company is incorporated by Act of Parliament of the Dominion does not make it a work for the general advantage of Canada, if it is intended to confine the undertaking to one province, unless there is some declaration that it is a work for the general advantage of Canada: **Regina v. Mohr**, 7 Q.L.R. 183; 2 Cart. 257, disapproved, however, in **Toronto v. Bell Telephone Co.** (1905), A.C. 52, at p. 57; but this declaration need not be express and may arise from necessary implication merely and therefore a recital in a Dominion Act of Incorporation that it is for the general advantage of Canada that the Act be passed is a sufficient declaration to bring the undertaking within the exclusive jurisdiction of the Dominion Parliament: **Re Ontario Power Co. and Hewson**, 6 O.L.R. 11; 8 O.L.R. 88; 36 S.C.R. 596.

Where a railway company is incorporated by Act of the Parliament of Canada (a) conferring powers to operate beyond as well as within a province and (b) declaring its undertaking to be for the general advantage of Canada, it is exclusively within Dominion jurisdiction

and a province cannot impose conditions precedent to the exercise of its powers. **Kerley v. London, etc., Ry. Co.**, 15 C.R.C. 337; reversing same case, 6 D.L.R. 189.

A declaration that a railway company's undertaking is for the general advantage of Canada is unnecessary when the company is incorporated by Parliament with powers extending beyond one province: **Ibid.** Parliament has power to modify or repeal a declaration under section 92 of the British North America Act that a provincial railway undertaking is for the general advantage of Canada: **H.G. and B. Ry. Co. v. Attorney-General for Ontario**, 20 C.R.C. 123.

By appropriate legislation a portion of a Dominion railway may be transferred to a provincial jurisdiction. "The Dominion legislation authorising the transfer to the provincial company of the property of the Dominion railway company involved by necessary implication a declaration that such property, when transferred, should no longer be part of a work for the general advantage of Canada; I entertain no doubt that such a declaration by the Dominion Parliament made with the concurrence of the Quebec legislature would be entirely effective to remove the property transferred from the Dominion jurisdiction under secs. 91 (29) and 92 (10) of the British North America Act"—per Duff, J., in **Montreal Tramways Co. v. Lachine, etc., Ry. Co.**, 18 C.R.C. 122; 50 S.C.R. 84.

A declaration by Parliament that a provincial railway is for the general advantage of Canada does not free it from a prior covenant to maintain a specified service. **North Queens Board of Trade v. Halifax, etc., Ry. Co.**, 20 C.R.C. 187.

Section 306 of the Act of 1888 extends only to the railways specified therein, and not to an electric railway which merely crosses one of these railways. **Re Ross and H.G. and B. Ry. Co.**, 19 C.R.C. 166.

See note, 19 C.R.C. 170.

8. Every railway, the construction or operation of which is authorised by Special Act of the legislature of any province and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to,—

Provincial
railways
connecting
with or
crossing
Dominion
Railways.

- (a) the connection or crossing of one railway with or by another, so far as concerns the aforesaid connection or crossing;
 - (b) criminal matters, including offences and penalties; and,
 - (c) navigable waters.
- R.S., c. 37, s. 8. Am.

After "railway" in the first line, the Act of 1906 had the words "steam or electric street railway or tramway," and after the word "railway" in sub-sec. (a), the word "tramway."

These words are made unnecessary by the new definition of railway sec. 2 (21).

There was also a sub-section making the railways in question subject to the provisions of the Act relating to "the through traffic upon a railway or tramway and all matters appertaining thereto," with the proviso "that in the case of railways owned by any provincial Government the provisions of this Act with respect to through traffic shall not apply without the consent of such Government." These clauses as to through traffic were declared *ultra vires* by the Supreme Court of Canada and by the Privy Council: **City of Montreal v. Montreal St. Ry. Co.**, 13 C.R.C. 541; (1912) A.C. 333; affirming **Montreal St. Ry. Co. v. City of Montreal**, 11 C.R.C. 203. See note on this case 13 C.R.C. 556.

Sub-section (a) was held *intra vires*: **Attorney-General for Alberta v. Attorney-General for Canada**, 19 C.R.C. 153; [1915] A.C. 363; **Toronto Ry. Co. v. City of Toronto and C.P.R.**, 20 C.R.C. 280; 53 S.C.R. 222; 30 D.L.R. 86.

Effective control of railways under federal jurisdiction necessarily involves some measure of control over railways otherwise subject to provincial jurisdiction connecting with or crossing them. To provide for such control without exceeding federal powers or encroaching unnecessarily upon provincial authority, is evidently the object of this section. At one time it was apparently thought necessary to declare all such connecting or crossing lines to be works for the general advantage of Canada, in order to found the jurisdiction of Parliament to legislate at all regarding them. This declaration was in fact made (see *infra*), but the effect was too sweeping, and section 8 is the result of several successive amendments.

The legislation in its present form can no doubt be justified on constitutional grounds as being necessary for the complete and proper exercise of the powers of Parliament with respect to railways within its general jurisdiction; **Patriarche v. G.T.R.**, 5 C.R.C. 200; sub-sections (b) and (c) are obviously *intra vires* as an exercise of the federal jurisdiction conferred by the B.N.A. Act as to criminal matters and navigable waters.

By sec. 306 of the Consolidated Railway Act of 1888, which was itself a re-enactment of 46 Vic., cap. 24, sec. 6 (D.), it was declared that any branch line or railway which connected with or crossed a railway declared to be a work for the general advantage of Canada should itself be deemed to be a work for the general advantage of Canada. The effect of this was that street railways or other railways or works using the highways passed from municipal and provincial control under the control of the Railway Committee of the Privy Council and such loss of municipal control impaired or was thought to impair the value of those municipal franchises which are dependent upon the right of a municipality to grant a right of way over the highways under its control upon such terms as it saw proper and as might be authorised by provincial legislation. This effect would appear to follow from the case of **City of Toronto v. Bell Telephone Co.**, 3 O.L.R. 465, 6 O.L.R. 335, (1905), A.C. 52. To obviate the danger of such loss of control and of impairment of such advantageous agreement as a municipality might have entered into with a street railway company it was enacted by 63 & 64 Vic., cap. 23, sec. 1 (D.), that street railways and tramways while declared to be subject to the provisions of the Railway Act (1888) relating to crossing or connecting with a railway under Dominion jurisdiction should not be considered to be works for the general advantage of Canada, nor be subject to any other provisions of the Railway Act. These sections were not reproduced in the statute of 1903, which, by section 310, repealed them. Sec. 7 of that Act was no doubt intended to take their place.

It will be observed that section 8 of the present Act differs from section 7 of the Act of 1903 in omitting to declare the intersecting or connecting railways to be for any purpose or in any respect for the general advantage of Canada. In this it resembles more closely 63 & 64 Vic., cap. 23, sec. 1. It was at one time doubted whether Parliament having once exercised its right under the B.N.A., Act to declare certain works to be for the general ad-

vantage of Canada, could divest itself of the jurisdiction thus assumed and remit such works to the provincial jurisdiction. **Patriarche v. G.T.R. Ry.** (Railway Commissioners), 5 C.R.C. 200 at p. 204, but it has now been held that by subsequent enactment Parliament may modify or repeal such a declaration, **H.G. and B. Ry. Co. v. Attorney-General for Ont.**, 20 C.R.C. 123, (1916) 2 A.C. 583; 29 D.L.R. 521; affirming **Re Ross and H.G. and B. Ry. Co.** 19 C.R.C. 166; 25 D.L.R. 613; 34 O.L.R. 599. In that view, the effect of the present section and of the repeal of the Act of 1903 appears to be that every railway incorporated by Provincial legislation, which does not extend beyond the limits of a province and which is not by sec. 6 (c) or has not been by express enactment (other than the general enactment above referred to) declared to be a work for the general advantage of Canada, is now remitted to the provincial jurisdiction, except as to three matters expressly mentioned in the section. It would appear that under the present enactments certain railways within the limits of the province which were formerly subject to the provisions of the general Railway Act by virtue of the fact that they crossed other railways which were declared to be for the general advantage of Canada are no longer subject to the provisions of the new Dominion Act except as to crossings, connections, navigable waters and criminal matters, and that in other respects they are now subject only to the provisions of the provincial Railway Acts and their own charters of incorporation.

In consolidations of the Dominion Railway Act previous to 1903 it was customary to declare that certain sections only should apply to some railways which had been incorporated by the Provincial Legislatures either before or after Confederation; in the consolidation of that year it was for the first time enacted that a railway company should be considered for the general advantage of Canada for certain purposes only. It has never been decided whether it is competent for the Parliament of Canada to declare that a railway shall be deemed to be a work for the general advantage of Canada for certain purposes only, and the wording of the present section makes a decision on the point unnecessary.

Another question—as to the extent to which it is competent to declare a provincial railway to be subject to Dominion jurisdiction in regard to a few only out of the many matters which arise during construction and operation—has now been determined in part at least by the decision of the Privy Council in **City of Montreal v. Mont-**

real **St. Ry. Co.**, *supra*, that sub-section (b) of section 8 of the Act of 1906 was **intra vires** of Parliament, and that therefore the Board had no jurisdiction over through traffic of a provincial railway crossing or connecting with a Dominion railway. From a comparison of secs. 91 and 92 of the British North America Act it would appear to have been the intention of the Imperial Parliament to place these undertakings either within the exclusive jurisdiction of the Provincial authorities or else within the exclusive jurisdiction of the Dominion Government.

“Dual control” is contrary to the policy of the Act; per Duff. J., in **Montreal Tramways Case**, 18 C.R.C. 122 at p. 130; 50 S.C.R. 84; citing **Montreal St. Ry. Case**, *supra*.

There is no express provision that the Dominion Government may assume to itself certain limited powers only in regard to the railways or other works mentioned in the sections already referred to and may leave to the provinces the power to deal with the other matters not thereby undertaken by the Dominion. In **Hodge v. The Queen**, 9 A.C. 117, 3 Cart. 144, it was stated that subjects which in one aspect and for one purpose, fall within sec. 92 of the British North America Act may, in another aspect and for another purpose, fall within sec. 91; this had reference to the principles governing certain general classes of matters with which either the Province or the Dominion might conceivably have power to deal and cannot perhaps be considered applicable to such concrete objects as a railway, a steamship line or the other works referred to in sec. 92, sub-secs. 10 (a), (b), and (c).

The Board, however, has repeatedly exercised the jurisdiction over provincial railways conferred upon it by section 8 (a) of the present Act. (See, for example; **City of London v. London St. Ry. Co.**, 19 C.R.C. 436). The Supreme Court of Canada declared this sub-section **intra vires**. (**B.C. Electric Co. v. V., V. and E. Ry. Co.**, 15 C.R.C. 237) and though its judgment in this case was reversed by the Privy Council [1914], A.C. 1067, 18 C.R.C. 287; 19 D.L.R. 91, the reversal was on grounds which did not impugn the Board's jurisdiction under this sub-section in relation to railway requirements or to conditions created by railway construction or operation. The **ratio decidendi** of the Vancouver Case was pointed out by the Privy Council in **Toronto Ry. Co. v. City of Toronto** (1920) A.C. 426; 25 C.R.C. 318. The sub-section was declared **intra vires** by the Privy Council (**Attorney-General for Alberta v. Attorney-General for Canada**, 19 C.R.C. 153

(1915) A.C. 363); and it may now be said that Parliament may legislate regarding provincial railways so far (and only so far) as its legislation is necessarily incidental to the efficient exercise of its powers under the enumerated heads of sec. 91 of the B.N.A. Act; *per* Lord Atkinson, pronouncing the judgment of the Judicial Committee in **City of Montreal v. Montreal St. Ry. Co.**, 13 C.R.C. 541; (1912) A.C. 333. Necessity, and not mere convenience, is the test. (Board: **Lachine Ry. Co. v. Montreal Tramways Co.**, 18 C.R.C. 133 at p. 141). What is necessary for the purpose is not to be arbitrarily laid down by Parliament itself, but is ultimately to be determined by the Courts. See discussion of cases as to "necessarily incidental" and "truly ancillary" in the dissenting judgment of Anglin, J., in the **Montreal St. Ry. Case**, in the Supreme Court of Canada, 43 S.C.R., 197, at p. 233.

The constitutional limitations of the powers of Parliament and of the provincial legislatures may perhaps be overcome by joint action, such as is provided for by section 253 (3).

As to the powers of the Board under this section as formerly worded, see **Preston Street Ry. Co. v. G.T.R.**, 6 C.R.C. 142.

Section 7 of the Act of 1903 was limited in its operation to provincial railways connecting with or crossing a railway which "at the time of such connection or crossing" was subject to federal jurisdiction. Section 8 of the present Act does not impose this limitation in express terms and probably the effect of the change in wording is to bring under the provisions of the section all provincial railways crossing or crossed by or connecting with railways under federal jurisdiction without regard to priority of construction or to priority as between the date of construction or crossing and the date at which one of the roads is brought by declaration under federal control.

The Board has power to compel a provincial railway in the public interest, to cross a Dominion railway by a double, instead of a single track. **City of London v. London St. Ry. Co.**, 19 C.R.C. 436.

The Board has power to order grade separation at a highway crossing and to apportion cost between Dominion and provincial railway companies and municipalities interested. **Hamilton St. Ry. Co. v. G.T.R.**, 17 C.R.C. 393.

The Board has jurisdiction to regulate the crossing of a provincial over a Dominion railway. **Midland, etc., Ry. Co. v. G.T.R.**, 23 C.R.C. 80.

**Board of Commissioners.
Constitution.**

9. (1) There shall be a commission, known as the Board of Railway Commissioners for Canada, consisting of **six** members appointed by the Governor in Council.

Board, how
constituted.

(2) Such commission shall be a court of record, and have an official seal which shall be judicially noticed.

Court of
Record.

(3) Each commissioner shall hold office during good behavior for a period of ten years from the date of his appointment, but may be removed at any time by the Governor in Council **upon address of the Senate and House of Commons.**

Tenure.

(4) A commissioner shall cease to hold office upon reaching the age of seventy-five years.

(5) A commissioner on the expiration of his term of office shall, if not disqualified by age, be eligible for re-appointment. R.S., c. 37, s. 10 (1)—(4); 1908, c. 62, s. 1. Am.

Reappoint-
ment.

The Act of 1906 provided for three commissioners only. The number was increased to six in 1908.

The words "upon address of the Senate and House of Commons" have been substituted for the words, "for cause." The amendment makes the commissioners, like judges, removable only upon impeachment by Parliament, and therefore independent of the Crown or the Government. The language of the latter part of this subsection was copied from section 99 of the British North America Act. Formerly the provision against removal, except upon address of Parliament, applied only to a commissioner who had been a judge; and was apparently intended to preserve to him the same security as a commissioner as he had enjoyed while a judge; now all the commissioners during their term of office are given the same protection.

Section 9 and other sections are copied largely from the English Railway and Canal Traffic Act, 1888, 51 & 52 Vic., cap. 25. By sections 2 and 3 of the English Act, provision is made that the Railway and Canal Commission shall be a Court of Record with an official seal to be judicially noticed.

A Court of Record is one whose records are absolutely authoritative as distinguished from courts not of record, or inferior courts whose proceedings must in every

case be proved like other facts. The High Court of Justice and the Court of Appeal are Superior Courts of Record both in Ontario and in England.

The Board is a judicial as well as an executive body created to enforce Dominion railway legislation, but not to supplant or supplement the Provincial courts in the exercise of their ordinary jurisdiction. **Duthie v. G.T.R.**, 4 C.R.C. 304.

"This is not, as we have stated, a court for the adjustment of disputes arising out of agreements entered into by parties respecting questions wholly personal to themselves, or at least of a private rather than a public nature, and we must again emphasize the opinion that it is not within our province in administering the act which constitutes this Board, to attempt to provide remedies or afford relief in cases in which said relief and said remedies can better be afforded by the ordinary tribunals of the country." Per Blair, Chief Commissioner, **York Street Bridge Case** (1904), 4 C.R.C. 62 at p. 69.

But see section 35 which empowers the Board to enforce agreements within the scope of the section.

The making of an order of the Board approving a special form of contract for carriage is a judicial proceeding and fractions of days are not regarded, so that the order is in force at the earliest moment of the day on which it is made, **Buskey v. C.P.R.**, 11 O.L.R. 1; 5 C.R.C. 384.

Chief
Commissioner and
Assistant
Chief Commissioner.

10. (1) One of such commissioners shall be appointed by the Governor in Council, Chief Commissioner, and another of them Assistant Chief Commissioner of the Board.

(2) Any person may be appointed Chief Commissioner who is or has been a judge of a superior court of Canada or of any province of Canada, or who is a barrister or advocate of at least ten years' standing at the bar of any such province.

(3) Any person may be appointed Assistant Chief Commissioner who is or has been a judge of a superior court of Canada or of any province of Canada, or who is a barrister or advocate of at least ten years' standing at the bar of any such province, **or who is a barrister or advocate of any such province and has held office as a Commissioner of the Board for a period of at least ten years.**

(4) The Chief Commissioner shall be entitled to hold the office of Chief Commissioner, and the Assistant Chief Commissioner the office of Assistant Chief Commissioner or that of Chief Commissioner, so long as they respectively continue to be members of the Board.

(5) The Assistant Chief Commissioner shall have all the powers of the Chief Commissioner; but such powers shall not be exercised by him except in the absence of the Chief Commissioner, and whenever he has acted it shall be conclusively presumed that he so acted in the absence or disability of the Chief Commissioner within the meaning of this section. 1908, c. 62, s. 2.

Powers of
Assistant
Chief Com-
missioner.

Before the enactment of 7-8 Edw. VII., cap. 62, (1908), the Board consisted of three members, one of whom was styled Chief Commissioner, and another Deputy Chief Commissioner. By the amending Act the membership was increased to six and a new office was created, that of Assistant Chief Commissioner, the qualifications for which were the same as those for Chief Commissioner. The increase of the membership and the wide powers conferred on the Assistant Chief Commissioner made it possible for the Board by dividing its forces (see sections 12 and 18) to deal more rapidly and efficiently with the work assigned to it.

The qualifications for assistant chief commissioner are now modified so as to make ten years' service as a commissioner sufficient, instead of ten years' standing at the bar; the words in sub-section (3) from "or who is a barrister" in the fifth line to the end of the sub-section are new.

11. (1) Another of the commissioners shall be appointed, by the Governor in Council, Deputy Chief Commissioner of the Board.

Deputy
Chief Com-
missioner.

(2) In case of the absence of the Chief Commissioner and the Assistant Chief Commissioner, or of their inability to act, the Deputy Chief Commissioner shall exercise the powers of the Chief Commissioner **for him** or in his stead, and in such cases, all regulations, orders and other documents signed by the Deputy Chief Commissioner shall have the like force and effect as if signed by the Chief Commissioner.

Powers of
Deputy Chief
Commis-
sioner.

(3) Whenever the Deputy Chief Commissioner appears to have acted for or instead of the Chief Commis-

Presumption.

sioner, it shall be conclusively presumed that he so acted in the absence or disability of the Chief Commissioner and of the Assistant Chief Commissioner within the meaning of this section.

Authority
to other
commis-
sioner.

(4) Where the Chief Commissioner deems it necessary for the more speedy and convenient despatch of business he may by writing authorise any commissioner to sign regulations, orders and other documents in his stead, and when done pursuant to such authority the same shall have the like force and effect as if signed by the Chief Commissioner. R.S., c. 37, s. 10 (6); 1908, c. 62, s. 3. Am.

The Act of 1906 did not provide for an Assistant Chief Commissioner. See notes to sec. 10.

Sub-section 4 is new.

Quorum.

12. (1) Two commissioners shall form a quorum, and not less than two commissioners shall attend at the hearing of every case; Provided that,—

Powers of
single Com-
missioner.

(a) in any case where there is no opposing party and no notice to be given to any interested party, any one commissioner may act alone for the Board; and

(b) the Board, or the Chief Commissioner, may authorise any one of the commissioners to report to the Board upon any question or matter arising in connection with the business of the Board, and when so authorised such commissioner shall have all the powers of two commissioners sitting together for the purpose of taking evidence or acquiring the necessary information for the purpose of such report, and upon such report being made to the Board, it may be adopted as the order of the Board, or otherwise dealt with as to the Board seems proper.

Presiding
officer.

(2) The Chief Commissioner, when present, shall preside, and the Assistant Chief Commissioner, when present, in the absence of the Chief Commissioner, shall preside, and the opinion of either of them upon any question arising when he is presiding, which in the opinion of the commissioners is a question of law, shall prevail.

Questions
of law.

(3) No vacancy in the Board shall impair the right of the remaining commissioners to act. 1908, c. 62, s. 4. Vacancy.

Sub-section (1), with sections 18 and 19, makes it possible for the Board to hold several sittings simultaneously and in different places; sub-section (1a) provides for the speedy despatch of routine, consent, and other non-contentious business, much of which is disposed of in regular weekly sittings at Ottawa; and sub-section (1b) (see also sections 62, 69, 70 and 71), provides efficient means for enquiry into facts, without taking up the time of the full Board in prolonged sittings for the taking of evidence. Many matters, including some of much importance, are disposed of, after inquiry by correspondence or otherwise, without being brought to a formal hearing. Of 3,611 applications and complaints in the year ending 31st March, 1918, 80 per cent. were so disposed of.

In the English Railway and Canal Traffic Act, 1888, sec. 4, provision is made for **ex officio** Commissioner, who must be a Judge of a Superior Court and is appointed by the Lord Chancellor in England and Ireland and the Lord President of the Court of Session in Scotland. The provision for deciding a question of law is the same as section 5 (3) of the English Act.

In an application under section 193 (Act of 1903) now section 371, the opinion of the Chief Commissioner prevailed on the questions of law involved, where an exclusive contract was held valid and the parties whose interests were affected were held entitled to compensation. **The Telephone Case**, 3 C.R.C. 205.

13. Whenever any commissioner is interested in any matter before the Board, or of kin or affinity to any person interested in any such matter, the Governor in Council may, either upon the application of such commissioner or otherwise, appoint some disinterested person to act as commissioner **pro hac vice**; and the Governor in Council may also, in case of the illness, absence or inability to act of any commissioner, appoint a commissioner **pro hac vice**: Provided that no commissioner shall be disqualified to act by reason of interest or of kindred or affinity to any person interested in any matter before the Board. R.S., c. 37, s. 14.

Interest,
kindred or
affinity.

Illness,
absence, etc.

Commissioners and officers not to hold interest in stock or equipment.

14. (1) No commissioner or officer of the Board shall, directly or indirectly,—

(a) hold, purchase, take or become interested in any stock, share, bond, debenture or other security, of any company subject to this Act; or

(b) have any interest in any device, appliance, machine, patented process or article, or any part thereof, which may be required or used as a part of the equipment of railways or of any rolling stock to be used thereon, or of any other work or undertaking subject to this Act.

If acquired by will or succession.

(2) If any such stock, share, bond or other security, device, appliance, machine, patented process or article, or any part thereof or any interest therein, comes to or vests in any commissioner or officer of the Board by will or succession for his own benefit, he shall, within three months thereafter, absolutely sell and dispose of the same, or his interest therein. 1908, c. 62, s. 5. Am.

The words “for his own behalf” were formerly in sub-sec. (a). The Act of 1906 had “railway” before “company.”

The words “or of any other work or undertaking subject to this Act” in sub-sec. (b) are new.

Residence.

15. Each Commissioner shall during his term of office reside in the city of Ottawa, or within five miles thereof, or within such distance thereof as the Governor in Council at any time determines. R.S., c. 37, s. 16.

Whole time.

16. The commissioners shall devote the whole of their time to the performance of their duties under this Act, and shall not accept or hold any office or employment inconsistent with this section. R.S., c. 37, s. 17.

Offices.

Offices in Ottawa.

17. (1) The Governor in Council shall, upon the recommendation of the Minister, provide, within the city of Ottawa, a suitable place in which the sessions of the Board may be held, and also suitable offices for the commissioners, and for the Secretary, and the officers and employees of the Board, and all necessary furnishings, stationery and equipment for the conduct, maintenance

and performance of the duties of the Board.

(2) The Governor in Council, upon the recommendation of the Minister, may establish at any place or places in Canada such office or offices as are required for the Board, and may provide therefor the necessary accommodation, furnishings, stationery and equipment. R.S., c. 37, s. 18; 1908, c. 62, s. 7.

Offices
elsewhere
than in
Ottawa.

Sub-section (2) was not in the Act of 1906.

Sittings and Disposal of Business.

18. The Board may hold more than one sitting at the same time, and, whenever circumstances render it expedient to hold a sitting elsewhere than in Ottawa, may hold such sitting in any part of Canada. R.S., c. 37, s. 19; 1908, c. 62, s. 6.

Sittings.

19. (1) The commissioners shall sit at such times and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business.

Sittings, how
conducted.

(2) They may, subject to the provisions of this Act, sit either together or separately, and either in private or in open court: Provided that any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court. R.S., c. 37, s. 20.

20. Subject to the provisions of this Act, the Board may make rules and provisions respecting,—

Arrangement
of sittings
and business.

- (a) the sittings of the Board;
- (b) the manner of dealing with matters and business before the Board;
- (c) the apportionment of the work of the Board among its members, and the assignment of members to sit at hearings, and to preside thereat; and,
- (d) generally, the carrying on of the work of the Board, the management of its internal affairs, and the duties of its officers and employees;

and in the absence of other rule or provision as to any such matter, such matter shall be in the charge and control of the Chief Commissioner or such other member or members of the Board as the Board directs. **New.**

Experts.

Experts.

21. The Governor in Council may, from time to time, or as the occasion requires, appoint one or more experts, or persons having technical or special knowledge of the matters in question, to assist in an advisory capacity in respect of any matter before the Board. R.S., c. 37, s. 21.

Secretary.

Secretary.

22. There shall be a Secretary of the Board who shall be appointed by the Governor in Council, and who shall hold office during pleasure, and reside in the city of Ottawa. R.S., c. 37, s. 22.

Duties of Secretary.

23. (1) It shall be the duty of the Secretary,—

(a) to keep a record of all proceedings conducted before the Board or any commissioner under this Act;

(b) to have the custody and care of all records and documents belonging or appertaining to the Board or filed in his office;

(c) to obey all rules and directions which may be made or given by the Board, or the Chief Commissioner touching his duties or office, and in the event of a conflict of such rules or directions those made by the Board shall prevail;

(d) to have every regulation and order of the Board drawn pursuant to the direction of the Board, duly signed and sealed with the official seal of the Board, and filed in the office of the Secretary.

Record books.

(2) The Secretary shall keep in his office suitable books of record, in which he shall enter a true copy of every such regulation and order, and every other document which the Board may require to be entered therein, and such entry shall constitute and be the original record of any such regulation or order.

Certified copies.

(3) Upon application of any person, and on payment of such fees as the Board may prescribe, the Secretary shall deliver to such applicant a certified copy of any such regulation or order. R.S., c. 37, s. 23. Am.

This section in the former Act contained a sub-section requiring the secretary "to attend all sessions of the

Board." This is obviously impossible now, since the Board may sit in two or more places at the same time.

Sub-sec. (c) formerly read: "To obey all rules and directions which may be made or given by the Board touching his duties or office."

Instead of "duly signed" in sub-sec. (d), the Act of 1906 had "signed by the Chief Commissioner." See secs. 10 (5), and 11 (2), and 11 (4).

24. In the absence of the Secretary from illness or any other cause, the Board may appoint from its staff an acting secretary, who shall thereupon act in the place of the Secretary, and exercise his powers. R.S., c. 37, s. 24.

Acting
Secretary.

Staff.

25. Such other officers, clerks and employees as are necessary for the proper conduct of the business of the Board may be appointed in accordance with the provisions of **The Civil Service Act**, 1918, and of any Acts in amendment thereof.

Staff of
Board.

Under the Act of 1906, sec. 25, the Board appointed these officers, clerks and employees, with the approval of the Governor-in-Council, and dismissed them at will.

Salaries and Payments.

26. (1) The Chief Commissioner shall be paid an annual salary of twelve thousand five hundred dollars, the Assistant Chief Commissioner an annual salary of nine thousand dollars, and each of the other commissioners an annual salary of eight thousand dollars.

Commis-
sioners.

(2) Such salaries shall be paid monthly out of the unappropriated funds in the hands of the Receiver General for Canada.

When and
how payable.

(3) The Secretary may be paid out of money appropriated by Parliament for such purpose such annual salary as may from time to time be fixed by the Governor in Council. R.S., c. 37, s. 35; 1908, c. 62, s. 9; 1913, c. 44, s. 1. Am.

Secretary.

Under the Act of 1906, the Chief Commissioner's salary was ten thousand dollars; and the Secretary's was not to exceed four thousand.

Staff.

27. The officers, clerks and employees attached to the Board may be paid out of such money as may be appropriated by Parliament for the purpose. R.S., c. 37, s. 36. Am.

In the Act of 1906, the corresponding section read: "The officers, clerks, stenographers and messengers attached to the Board shall receive such salaries or remuneration as approved by the Governor in Council upon the recommendation of the Board." See note to sec. 25.

Others.

28. Whenever the Board, by virtue of any power vested in it by this Act or any other Act of the Parliament of Canada appoints or directs any person, other than a member of the staff of the Board, to perform any service, such person shall be paid therefor such sum for services and expenses as the Governor in Council may, upon the recommendation of the Board, determine. R.S., c. 37, s. 37. Am.

The words "or any other Act of the Parliament of Canada" are new. The Act of 1906 had the words "required by this Act" after the words "any service." See notes to sec. 33 (4).

Paid
monthly.

29. The salaries or remuneration of all such officers, clerks, stenographers, and messengers, and all the expenses of the Board incidental to the carrying out of this Act, including all actual and reasonable travelling expenses of the commissioners and the Secretary, and of such members of the staff of the Board as may be required by the Board to travel, necessarily incurred in attending to the duties of their office, shall be paid monthly out of moneys to be provided by Parliament. R.S., c. 37, s. 38.

Franking Privilege.

Correspond-
ence free of
postage.

30. All letters or mailable matter addressed to the Board or the Secretary at Ottawa, or sent by the Board or the Secretary from Ottawa, shall be free of Canada postage under such regulations as are from time to time made in that regard by the Governor in Council. R.S., c. 37, s. 39.

Annual Report.

31. (1) The Board shall, within two months after the thirty-first day of December in each year, make to the Governor in Council through the Minister, an annual report, for the year ended on the thirty-first day of December, showing briefly,—

Annual report to Governor in Council.

(a) applications to the Board and summaries of the findings thereon under this Act;

(b) summaries of the findings of the Board in regard to any matter or thing respecting which the Board has acted of its own motion, or upon the request of the Minister;

(c) such other matters as appear to the Board to be of public interest in connection with the persons, companies and railways subject to this Act.

(2) The said report shall be forthwith laid before both Houses of Parliament, if then in session, and if not in session then during the first fifteen days of the next ensuing session of Parliament. 1909, c. 32, s. 12. Am.

Report to be laid before Parliament.

31st March has been altered to 31st December to conform to the practice adopted by the railways of making the fiscal year end with the calendar year.

The Act of 1906 had a sub-section 1 (d), as follows: "Such matters as the Governor in Council directs."

General Jurisdiction and Powers.

The history of the Railway Commission since its establishment by the Act of 1903 has been one of constantly expanding jurisdiction. The original Act conferred powers greatly in excess of those enjoyed by the Railway Committee, and by legislation and judicial decisions since that time the jurisdiction of the Board has been extended and confirmed until as an executive and judicial body it now exercises a quite unique authority. Its decisions are reviewable only by the Governor in Council and in certain cases by the Supreme Court of Canada. Even when it acts without jurisdiction, objection must be taken in this way and cannot be taken in collateral proceedings in any court; evidently, however, this provision can only be effective at most within the limits of such jurisdiction as Parliament might confer, and cannot be held to restrict the right of recourse to the courts as to matters exclusively within provincial jurisdiction. Though it is a crea-

ture of a Dominion statute the Privy Council has upheld its jurisdiction for certain purposes over municipalities created by the Provinces. The field of its operations is being gradually extended. Telephone, telegraph and express companies have been brought under its control. Jurisdiction has been conferred upon it to entertain complaints founded on breach of agreement with railway companies and to grant certain relief. The present Act, for the first time, makes provision toward bringing Government railways under its control.

The evident tendency of recent legislation is to place all matters connected with the methods of railway construction and operation under the exclusive control of one authority acting both as a court of original jurisdiction and as an executive body, whose decisions and orders are final except for the limited remedy by way of appeal given by the Act, the intervention of the Governor in Council, and the right of appeal to the Privy Council if leave be given by it in the exercise of the King's prerogative: **Toronto Ry. Co. v. City of Toronto**, 46 O.L.R. 452.

The wide jurisdiction conferred on the Board, its mobility, the simplicity of its procedure, the increase in the number of its members, the liberal interpretation given to the words of the Act defining those who may apply to the Board for relief, and the provision made against interference with its operations by collateral proceedings elsewhere all tend to make the Board an effective instrument for dealing promptly and with authority with all questions affecting the relations of railway and other companies subject to the Act with one another and with the public.

The jurisdiction of the Board, as of the railway committee, is not inherent but statutory and must be found in the Act constituting it. It can only exercise such powers as are by statute conferred upon it: **G.T.R. v. Toronto**, 1 C.R.C. at p. 92; **The Merriton Crossing Case**, 3 C.R.C. 263; **City of Victoria v. Esquimalt, etc., Ry. Co.**, 24 C.R.C. 84; **Kelly v. G.T.R. Co.**, 24 C.R.C. 367.

An order of the Railway Committee of itself and apart from the provisions of law thereby made applicable confers no authority. **Corporation of Parkdale v. West**, 12 App. Cas. 611.

The foundation of the jurisdiction of the Board is the old jurisdiction of the Railway Committee. See section 11 of the Act of 1888. But this jurisdiction was extended by the Act of 1903, which abolished the Railway Committee

and established the Commission in its place with powers of a Superior Court, following the English Act, 51 & 52 Vic., cap. 25 (Imp.), from which sub-sections 2 and 3 (above) are taken.

As to the jurisdiction of the Board generally, see note on **Montreal St. Ry. Co. v. Montreal Terminal Ry. Co.**, 36 S.C.R. 369, in 4 C.R.C. at p. 373.

For a decision as to the cognate powers of the United States Interstate Commerce Commission, see **Re Order of Railway Conductors**, 1 I.C. Rep. 18.

General Jurisdiction and Powers.

32. Whenever, by an Act or document, the Railway Committee of the Privy Council is given any power or authority, or charged with any duty with regard to any company, railway, matter or thing, such power, authority or duty may, or shall, be exercised by the Board. R. S., c. 37, s. 11.

Powers of
Railway
Committee
transferred.

See also sec. 458, giving the Board power to repeal, rescind, change, or vary regulations and orders made before the Act of 1903, by the Railway Committee; and following two sections, providing for the enforcement of orders of the Railway Committee, and action by the Governor in Council thereon in the same manner as if the Act of 1903 had not been passed.

See **G.T.R. and C.P.R. v. City of Toronto**, 6. O.W.R. 852.

The sanction of the Governor in Council was required to an order of the Railway Committee made under section 187 of the Act of 1888. Without such sanction an Order of the Committee was not **in force** and could not be dealt with by the Board. To meet the case of such orders, section 1 of 4 Edw. VII., cap. 32, was passed, providing that the Governor in Council might still exercise his powers under the previous Act.

An order of the Railway Committee or of the Board may become a rule of Court. Sec. 49, **infra**.

33. (1) The Board shall have full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,—

Jurisdiction.

- (a) complaining that any company, or person, has failed to do any act, matter or thing required to

be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Board, or any inspecting engineer **or other lawful authority**, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, or the Special Act, or any such regulation, order, or direction; or,

(b) requesting the Board to make any order, or give any direction, **leave**, sanction or approval, which by law it is authorised to make or give, or with respect to any matter, act or thing, which by this Act, or the Special Act, is prohibited, sanctioned or required to be done.

Mandatory
orders.

(2) The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act, or the Special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the Special Act; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.

Restraining
orders.

All powers
of a superior
court.

(3) The Board shall, as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, have all such powers, rights and privileges as are vested in a superior court.

The words "or other lawful authority" in sub-sec 1 (a) are new. The word "leave" in sub-sec. 1 (b) is new.

After the word "jurisdiction" in sub-sec. 3, the Act of 1906 had the words "under this Act or otherwise for carrying this Act into effect." See note following sub-sec. 4 of this section.

A very important amendment to sub-section 2 has been made by the omission of the words "or authorised" after the word "required." These words were not in the

Act of 1903, but were inserted in 1906, and under them the Supreme Court of Canada held that the Board had power of its own motion, to order and require a company to do anything which, under the Act, the company might be authorised to do; though Duff. J., dissenting, thought this construction of the section was altogether too broad. **G.T.R. Co. v. Dept. of Agriculture for Ontario**, 10 C.R.C. 84; 42 S.C.R. 557.

A similar contention failed in **Hamilton v. T. H. and B. Co.**, 17 C.R.C. 370; 50 S.C.R. 128; reversing s.c. 17 C.R.C. 353.

The very fullest possible effect should be given to the language of sub-sec. 3 as to enforcement of orders; and the Board has jurisdiction to enforce its own orders, made within its jurisdiction; **per Nesbitt, J., Montreal Street R.W. Co. v. Montreal Terminal R.W. Co.**, 36 S.C.R. 369.

Where one railway company moved unsuccessfully before the Board to vary an **ex parte** order obtained from the Board by another company it was held that the application to vary was a submission to the jurisdiction of the Board and the applicants were concluded within the scope of the judgment. **C.P.R. v. G.T.R.**, 12 O.L.R. 320; 5 C.R.C. 400.

(4) The fact that a receiver, manager, or other official of any railway, or a receiver of the property of a railway company, has been appointed by any court in Canada or any province thereof, or is managing or operating a railway under the authority of any such court, shall not be a bar to the exercise by the Board of its jurisdiction; but every such receiver, manager, or official shall be bound to manage and operate any such railway in accordance with this Act and with the orders and directions of the Board, whether general or referring particularly to such railway; and every such receiver, manager, or official, and every person acting under him, shall obey all orders of the Board within its jurisdiction in respect of such railway, and be subject to have them enforced against him by the Board, notwithstanding the fact that such receiver, manager, official or person is appointed by or acts under the authority of any court; **and wherever by reason of insolvency, sale under mortgage, or any other cause, a railway or section thereof is operated, managed or held otherwise than by the company, the Board**

Appointment
of receiver
not to oust
jurisdiction
of Board.

Adapting
and applying
Act.

may make any order it deems proper for adapting and applying the provisions of this Act to such case.

See sec. 150 as to purchase by person without corporate power to operate.

The last clause of sub-sec. (4), beginning with the words "and wherever" is new. It was passed to meet the difficulty, under the circumstances stated, of applying sec. 323 and other tariff sections.

The Act of 1906 had "any jurisdiction conferred by this Act" instead of the words "its jurisdiction" where they first occur in sub-section 4. This and a similar change in sub-sec (3), were made in order that the section might apply not only to jurisdiction conferred by this Act, but also to jurisdiction conferred by a Special Act or any other Act of the Parliament of Canada, e.g., R.S.C. 1906, c. 109.

Certain
decisions of
Board
conclusive.

(5) The decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons. R.S., c. 37, s. 26. Am.

Sub-section 5 (formerly sub-section 23 (2) of the Act of 1903) was probably introduced to meet the point decided in **Re C.P.R. and York**, 1 C.R.C. 47, where the Ontario Court of Appeal held that the county of York was not a "person interested" in the protection of a highway within the jurisdiction of the Township of York by gates and watchmen at a railway crossing within the meaning of sections 11, 187 and 188 of the Act of 1888. This decision was followed in **Frontenac v. G.T.R.** 8 Ex. C.R. 349, 4 C.R.C. 102, and **Toronto v. G.T.R.**, 37 S.C.R. 232, 5 C.R.C. 138.

As to who is a party interested under the present Act, see remarks of Chief Commissioner Killam in **Duthie v. G.T.R.**, 4 C.R.C. 304.

A municipality may be a "person interested," **City of Toronto v. G.T.R.**, 37 S.C.R. 232, and may be compelled to contribute as such to the cost of protection under sections 187 and 188 of the Act of 1888, which as applied to a municipality created by provincial legislation are *intra vires* of the Dominion Parliament. **Toronto v. C.P.R.** (1908) A.C. 29, 7 C.R.C. 282.

A municipality may be compelled so to contribute though the highway crossing in question is not within or

immediately adjoining its bounds. **County of Carleton v. City of Ottawa**, 41 S.C.R. 552, 9 C.R.C. 154.

Where the question is whether a municipality is a "person interested" so as to be liable to contribute to the cost of works ordered by the Board, the Board will decide for itself whether there is such interest, both as a question of law and also as a question of fact; and will also decide in the exercise of its discretion whether the municipality should contribute. **G.T.R. v. Cedar Dale**, 7 C.R.C. 73.

Though a municipality may have interest enough in the construction of an interchange track to press persistently to compel the railways to construct it, it is not an "interested party" when apportionment of cost is to be considered. Meaning of "interested or affected by" considered; and cases collected: **Town of Thorold v. G.T.R. Co., et al.**, 24 C.R.C. 21.

See also **Hamilton St. Ry. Co. v. G.T.R.**, 17 C.R.C. 393; and cases cited in notes to section 39, *infra*.

The following are among the many reported decisions as to the jurisdiction of the Board. Others will be found under various sections.

A railway company applying to the Board to vary an *ex parte* order thereby submits to the jurisdiction. **C.P.R. v. G.T.R.**, 5 C.R.C. 400; 12 O.L.R. 320.

Specific breach of an agreement must be shown to give the Board jurisdiction under sec. 35. **Hamilton v. G.T.R.**, 21 C.R.C. 211.

Agreements.

The Board is not limited by prior agreements between parties where it is necessary to over-ride them to carry out the provisions of the Act. **Ray v. C.N.R. Co.**, 16 C.R.C. 276; **Hamilton v. T. H. and B. Ry. Co.**, 17 C.R.C. 353; reversed on other grounds, 370; **Montreal, etc., Ry. Co. v. Towns of Greenfield Park**, 23 C.R.C. 106; **Atkinson v. Victoria, etc., Ry. Co.**, 24 C.R.C. 378. **Increase in Rates Case**, 22 C.R.C. 49.

The Board does not deal with contracts between shippers and purchasers.

Oliver Serim Lumber Co. v. C.P.R., 17 C.R.C. 324.

The Board cannot over-ride agreements made by a provincial company which have been validated by a Dominion Act declaring the railway for the general advantage of Canada.

Increase in Rates Case, 22 C.R.C. 49; **Hamilton Radial Ry. Co. v. Hamilton**, 23 C.R.C. 114.

The Board has no jurisdiction, under sec. 361, to recommend for validation agreements of a company which has since become insolvent and ceased operations. **In re Central Railway Agreements**, 24 C.R.C. 117.

See also cases cited under sec. 35.

Clearances.

The Board has jurisdiction over all clearances on Dominion railways. **Hydro Electric P.C. v. L. & P.S. Ry.**, 17 C.R.C. 326.

Compensation.

The Board could not (before being expressly authorised: see sec. 255) impose payment of compensation to landowners affected as a condition of approving a location on a highway. **G.T.P. Ry. v. Fort William Landowners**. [1912] A.C., 224; 13 C.R.C. 187.

The Board cannot define the zone of injury within which landowners may recover damages for injurious affection by closing or crossing highways under an agreement between a municipality and a railway where the Board has made no order imposing compensation as a condition of the work. **C.N.O.R. v. North Bay**, 18 C.R.C. 309.

The Board has no jurisdiction under secs. 247 and 248 to order payment of compensation as a condition of approving location of telephone lines on public highways. **Bell Telephone Co. v. City of London**, 24 C.R.C. 102.

Conditions.

An order imposing conditions beyond the power of the Board to make is void unless the conditions are accepted. **C.N.R. Co. v. Taylor**, 15 C.R.C. 298.

See also under "compensation," *infra*.

Costs.

The Board has jurisdiction to award costs of proceedings before it, but its practice is not to do so. **Currie v. C.P.R.**, 13 C.R.C. 31; **C.P.R. v. Walkerton**, 15 C.R.C. 85.

As to costs of application by railways to permit Sunday work, see sec. 58 (2).

Crossings (Farm).

Board has no jurisdiction to declare an existing farm crossing useless. **Saindon v. Temiscouata Ry. Co.**, 14 C.R.C. 326.

The Board's jurisdiction does not oust the jurisdiction of the Courts to declare a landowner entitled to a farm crossing under an agreement and to grant relief. **McKenzie v. G.T.R.**, 7 C.R.C. 47; 14 O.L.R. 671.

The Board has jurisdiction to require construction of a farm crossing under the railway. **Re Cockerline and G. and G. Ry.**, 5 C.R.C. 313.

The Board's jurisdiction to order the establishment of farm crossings is exclusive. **G.T.R. v. Perrault**, 36 S.C.R. 671.

The Board in dealing with applications to carry highways over railways is not the guardian of municipalities as to wise expenditure of public funds. **Winnipeg v. C.P.R.**, 18 C.R.C. 317.

The Board has no jurisdiction to establish a new highway; but can authorise a municipality to do so across a railway. **High River v. C.P.R.**, 6 C.R.C. 344; **Re Village of Mannville**, 4th Annual Report of Board, p. 238; **Mission District v. C.P.R.**, 14 C.R.C. 331.

Crossings
(Highway).

The Board may authorise a municipality to construct a footbridge across a railway where no highway previously existed. **Vancouver v. C.P.R.**, 9 C.R.C. 478.

The Board's jurisdiction as to closing a highway is limited to the extinguishment of the public right to cross the railway; and is usually exercised by diverting the highway and then closing the road allowance within the right of way. **Re Closing Highways**, 15 C.R.C. 305.

The Board has jurisdiction under section 33 to prohibit maintenance and operation of a railway on a highway in contravention of express terms of its Act of Incorporation; and of the Railway Act; but not to prohibit ordinary obstruction of a highway by a railway company in contravention of municipal law. **Essex, etc., Ry. Co. v. Windsor, etc., Ry. Co.**, 7 C.R.C. 109.

The orders of the Board in this case, made in the exercise of its discretion, as to construction on a highway, crossing of one railway by another and apportionment of cost were upheld by the Supreme Court of Canada. **Essex, etc., Ry. Co. v. Windsor, etc., Ry. Co.**, 40 S.C.R., 620; 8 C.R.C. 1.

Where consent of a municipality is required as in sec. 255, evidence that such consent has been validly given in accordance with provincial law is necessary to found the jurisdiction of the Board. **Montreal St. Ry. Co. v. Montreal Terminal Co.**, 4 C.R.C. 373; 36 S.C.R. 369.

The Board's jurisdiction to make the order requiring the construction of the Toronto Viaduct was upheld by the Supreme Court of Canada: 42 S.C.R. 613; [1911] A.C. 461; 12 C.R.C. 378.

The Board has no jurisdiction to authorise a highway to be constructed under the wires of a power company: **Coleman v. C.N.Ry. Co.**, 20 C.R.C. 258.

Crossings
(Railway).

The Board has exclusive jurisdiction as to crossing of one railway by another. **C.P.R. v. G.T.R.**, 5 C.R.C. 400; 12 O.L.R. 320.

The Board has jurisdiction to regulate the crossing of a provincial over a Dominion railway. **Midland, etc., Ry. Co. v. G.T.P. Ry. Co.**, 23 C.R.C. 80.

Crossing
(Pipe).

The Board has jurisdiction to authorise the laying of a gas main under railway tracks, impose conditions and fix compensation. **Montreal, etc., Co. v. G.T.R.**, 17 C.R.C. 330.

Damages.

The Board has no jurisdiction to award damages for improperly taking away spur track facilities. **Robinson v. C.N. Ry. Co.**, 11 C.R.C. 289.

Nor for negligence of express employees. **Rogers v. Can. Express Co.**, 9 C.R.C. 480.

Nor for infractions of the Act—**Duthie v. G.T.R. Co.**, 4 C.R.C. 304.

Declaratory
Order.

The Board has power to make a declaratory order as to what is a proper tariff of tolls and that certain charges were illegal, even when tariff afterwards changed and no executive order necessary. **G.T.R. & C.P.R. v. Can. and Brit. Am. Oil Cos.**, 47 S.C.R. 155, 14 C.R.C. 201; affirmed **C.P.R. v. Can. Oil Cos.**, 17 C.R.C. 411 (1914), A.C. 1022; 19 D.L.R. 64.

But not to declare an existing farm crossing unnecessary. **Saindon v. Temiscouata Ry. Co.**, 14 C.R.C. 326.

Deviation.

The Board under sec. 178 cannot compel deviation of lines already located and constructed except upon application of the railway company: **Hamilton v. T.H. & B. Ry. Co.**, 50 S.C.R. 128; 17 C.R.C. 370; reversing 17 C.R.C. 353.

Discrim-
ination.

The Board held it had no jurisdiction under sec. 1 of 7-8 Edw. VII., c. 61, part 1, to entertain, at the instance of a provincial telephone company, a complaint of discrimination by a Dominion Telephone Company in favour of another provincial telephone company. **Port Hope Telephone Co. v. Bell Telephone Co.**, 17 C.R.C. 343.

It is not discrimination as such, but unjust discrimination, causing injury, that the Act prohibits and the Board has jurisdiction to prevent. **City of Toronto and Town of Brampton v. G.T.R. and C.P.R. Cos.**, 11 C.R.C. 370.

Drainage.

Where drainage works are undertaken under a provincial Act the Board's function is limited to seeing that the works as they affect the railway are sufficient and safe. **Humberstone v. G.T.R.**, 17 C.R.C. 316.

The Board has jurisdiction under section 33 to sanction drainage works authorised under sec. 162 (m), including works additional to those provided when line constructed, and authorise drainage works to be carried over "adjoining" lands irrespective of differences of ownership. **C.P.R. v. Murphy**, 5 C.R.C. 477.

The Board has no jurisdiction to discipline or remove an employee of a railway or telephone company: **In Re Anderson and Bell Telephone Co.**, 24 C.R.C. 224. Employees.

Board has no jurisdiction to order rebate of charges made in error. **Currie v. C.P.R.**, 13 C.R.C. 31.

Nor payment by company of expense incurred by shipper in fitting cars with appliances which should have been supplied by company as "suitable accommodation." Ex Post Facto.

Vancouver and Prince Rupert Meat Co. v. G.N. Ry. Co., 13 C.R.C. 15.

Nor refund of tolls under a legal tariff, afterwards found excessive and reduced. **Davy v. Niagara etc., Ry. Co.**, 9 C.R.C. 493; **Quebec Central v. Dominion Lime Co.**, 19 C.R.C. 281; **Midland Lumber Co. v. G.T.R. Co.**, 22 C.R.C. 387; **Security Bureau v. C.N.R. Co.**, 22 C.R.C. 414; **Dominion Concrete Co. v. C.P.R.**, 6 C.R.C. 514; **United Grain Growers v. C.N.R.**, 26 C.R.C. 26.

The Board has no power to make an **ex post facto** order. **Merritton Crossing Case**, 3 C.R.C. 263; **York Street Bridge Case**, 4 C.R.C. 62.

The Board has no power to permit the filing of a new location plan **nunc pro tunc**, the order not being made under sections 174 or 178. **Chambers v. C.P.R.**, 15 C.R.C. 293; 48 S.C.R. 162; 11 D.L.R. 669.

The Board has no power to vary a former order, by allowing a notice to be served under it where the time for serving it has expired, under circumstances where vested rights have accrued in the meantime. **Eckardt v. G.T. R.**, 7 C.R.C. 90.

The Board has no jurisdiction, under sec. 361, to validate or recommend for validation, **ex post facto**, agreements of a company which has since become insolvent and ceased operating, where the effect of such an order, if effective at all, would be to sanction the agreements **nunc pro tunc**: **In re Central Ry. Agreements**, 24 C.R.C. 117.

As to the right to impose penalties, **ex post facto**, for past offence, compare **Toronto Ry. Co. v. City of Toronto**, [1920] A.C. 446; 25 C.R.C. 310; 51 D.L.R. 69.

See also Joint Tariffs, *infra*.

Express.

The Board has jurisdiction as to express tolls over railway handling express matter; and may compel filing of express tariff. **Cardston v. Alberta R. & I. Co.**, 9 C.R.C. 214.

The Board could not (under the former Act of 1906) compel express companies to carry any particular commodity. (But see present section 364). **Can. and Dom. Exp. Cos. v. Commercial Acetylene Co.**, 9 C.R.C. 172.

The Board cannot compel Express Companies to provide express facilities at a station; its jurisdiction over Express Companies is confined to tolls, contracts limiting liability and directing what goods shall be carried by express. **Re Express Tolls**, 26 C.R.C. 32.

Facilities.

The Board, under sec. 6 (a) may compel foreign companies operating in Canada to provide proper facilities. **Stewart v. Napierville Jn. Ry. Co.**, 12 C.R.C. 399.

The Board cannot compel payment by railway company of expense incurred by shipper in providing proper facilities omitted by railway. **Vancouver, etc., Co. v. G.N.R. Co.**, 13 C.R.C. 15.

The Board has jurisdiction to compel a railway company to maintain a dock and provide facilities thereat. **Dom. Transportation Co. v. Algoma, etc., Ry. Co.**, 17 C.R.C. 422.

The Board cannot compel railway companies to instal telephones as "facilities" at station: **Province of Manitoba v. C.P.R. Co.**, 21 C.R.C. 445.

The Board has no jurisdiction to compel a railway company to furnish a foreign car of special size. **Hunting-Merritt Co. v. C.P.R.**, 20 C.R.C. 181.

The Board has no power to compel company to acquire land for the purpose of leasing it to applicants for a coal shed. **Village of Forward v. C.P.R.**, 19 C.R.C. 434.

The Board has jurisdiction to compel a railway to restore spur track facilities formerly enjoyed, which the Board found "reasonable and proper" and which it held must not be capriciously furnished and cut off. **C.N.W. Ry. Co. v. Robinson**, 6 C.R.C. 101; 37 S.C.R. 541.

The Board has power to compel a railway company to provide tank car equipment for carriage of oil, pursuant to an agreement to do so. **Empire Refining Co. v. Pere Marquette Ry. Co.**, 10 C.R.C. 158.

The Board has no jurisdiction under sec. 284 to order facilities, such as sidings, to be installed between stations: **New Minas Fruit Co. v. Dominion Atlantic Ry. Co.**, 24 C.R.C. 97.

The Board had no jurisdiction under sec. 254 (1906) to make a general order requiring companies to erect fences along their lines, as the section contemplated specific orders as to defined localities after judicial enquiry. (Fencing is now by sec. 274 obligatory in all localities, unless the Board relieves them from it.) **Re C.N.R. Co. and Board of Ry. Commissioners**, 10 C.R.C. 104; 42 S.C.R. 443. Fences.

The Board's jurisdiction is regulative, not originating; its powers as to free transportation are confined to restricting, extending, limiting or qualifying the free transportation proposed to be given by the railway companies: **Re Railway War Board**, 26 C.R.C., 1. Free Transportation.

The Board has jurisdiction to order grade separation at a highway crossing and to apportion the cost between Dominion and provincial railway companies and the municipalities interested. **Hamilton St. Ry. Co. v. G.T.R.**, 17 C.R.C. 393. Grade Separation.

See Crossings, Highway.

See **G.T.R. Co. v. C.P.R. Co.**, 6 C.R.C. 327; **Patriarche v. G.T.R.**, 5 C.R.C. 200 Interchange of traffic.

See also Tolls

The Board has no jurisdiction to fix a joint tariff rate between points in the U.S. and points in Canada, without concurrence of the foreign company, notwithstanding that the foreign company operates lines in Canada and is in respect of such lines within the jurisdiction of the Board. **Davy v. Niagara, etc., Ry. Co.**, 12 C.R.C. 61. Joint tariffs.

Where several companies, one incorporated by the Dominion, two by British Columbia and one by West Virginia, were controlled by a holding company incorporated in England and operated, as a single through route or system, with the same rolling stock and the same management, a railway and steamship line from a point in Alaska to a point in Yukon territory, held, that the Board had jurisdiction to compel the filing of a through tariff. (So far as this decision rests upon section 8 b (1906) it is over-ruled, it having been declared **ultra vires** of Parliament to control through traffic of a connecting provincial road). **Dawson Board of Trade v. White Pass Ry. Co.**, 9 C.R.C. 190.

The Board has no jurisdiction to compel a foreign company to file or concur in filing joint tariffs from points in U.S. to points in Canada. **Stockton v. Dom. Exp. Co.**, 13 C.R.C. 459.

But it has power to compel a Canadian company to concur in a joint tariff filed by a foreign company. **Ibid**; distinguishing **Stockton v. C.P.R.**, 9 C.R.C. 165.

Lands of
other
Railways.

The Board has power to authorise one railway company to take the land of another even to the great detriment of the latter. **Re Guelph and Goderich Ry. Co. and G.T.R.**, 6 C.R.C. 138.

The Board cannot compel a Dominion railway to shift its track for the convenience of a provincial railway; nor grant power to the provincial railway to take lands of a Dominion railway. **St. John, etc., Ry. Co. v. C.P.R.**, 17 C.R.C. 334; **Preston etc., Ry. Co. v. G.T.R. Co.**, 6 C.R.C. 142.

Location.

The Board has jurisdiction to rescind an order approving location plans. **McDougall v. C.P.R.**, 9 C.R.C. 201.

The Board cannot make **ex post facto** order allowing filing of location plans **nunc pro tunc**. **Chambers v. C. P.R.**, 48 S.C.R. 162; 15 C.R.C. 293.

Loss and
damage.

The Board has no jurisdiction to deal with loss and damage claims, or to pass upon liability for negligence: **United Grain Growers v. C.P.R.**, 26 C.R.C. 26.

Navigable
waters.

The Board has jurisdiction to order demolition of a solid filling, constructed across navigable waters without permission of the Minister. **G.T.P. Ry. Co. v. Rochester**, 15 C.R.C. 306; 48 S.C.R. 238.

Nuisance.

The Board has no jurisdiction, under (1906), secs. 26 (2) or 284 (now 33 and 312), or otherwise to direct removal of a stock pen as a public nuisance. **Bessette v. C. P.R. Co.**, 24 C.R.C. 113.

Opening for
traffic.

The Board before the passing of sec. 277 had no jurisdiction to order the opening of a railway for traffic except upon application of the company. **B.C. and Alberta Municipalities v. G.T.P. Ry. Co.**, 13 C.R.C. 463; **Central Saskatchewan Boards v. G.T.P. Ry. Co.**, 10 C.R.C. 135.

Operation.

The Board has jurisdiction to interfere with the operation of a railway only when it is shown not to be carrying on its undertaking as authorised by Parliament, so as to do as little harm as possible to adjoining owners. **City of Toronto v. C.N. Ry. Co.**, 21 C.R.C. 452.

The Board, and not the court, is the proper tribunal to enforce a provision in a railway's Act of incorporation requiring it to provide third class accommodation at a stated fare; mandamus refused. **Re Robertson and G.T.R.**, 6 C.R.C. 490, 14 O.L.R. 497.

The Board's functions are administrative, not advisory; it is no part of its duty to give opinions for the purpose of supporting legal claims: **Re General Order 151**, 25 C.R.C. 438. Opinions.

The Board's jurisdiction to act of its own motion (sec. 36), does not extend to cases where it is merely given power to approve, as in section 178. **Hamilton v. T. H. and B. Ry. Co.**, 50 S.C.R. 128; 17 C.R.C. 353, 370. Own motion.

Where objection made that applicant had no status, an order nevertheless made by the Board was upheld on the ground that the Board could act of its own motion—per Anglin, J., refusing leave to appeal; **G.T.P. Co. v. Purcell**, 15 C.R.C. 314.

Board has no jurisdiction to order railway to place cars for a stranger on a private spur. **Kammerer v. C.P.R. Co.**, 21 C.R.C. 74. Private spur.

Board had no jurisdiction (before passing of section 189) to allow to one industry the use of a private spur, constructed under special agreement for another industry; **Blackwoods, etc., Co. v. C.N.R. Co.**, 12 C.R.C. 45; 44 S.C.R. 92; **Boland v. G.T.R.**, 18 C.R.C. 60.

The Board has power to rescind an order approving location plan. **McDougall v. C.P.R.**, 9 C.R.C. 201. Rescinding order.

The Board, under its power to rescind or vary, reopened a closed street, owing to changed conditions, but on terms. **Victoria v. Esquimalt, etc., Ry.**, 9 C.R.C. 470.

The Board has no jurisdiction to compel a company to receive traffic except at regular stopping places established under the Act. **Kammerer v. C.P.R.**, 21 C.R.C. 74. Stations and stopping places.

The Board has jurisdiction under section 188 (4) to compel subsidised railways to furnish adequate station accommodation. **Stewart v. Napierville Jn. Ry. Co.**, 12 C.R.C. 399.

The Board will only intervene as to station accommodation when there is a public need for a station; or an agreement to establish one. **G.T.P. v. South Hazelton**, 15 C.R.C. 101.

The initial discretion as to location of stations rests with the carrier, subject to correction by the Board in unusual circumstances or when discretion unreasonably exercised. **Hartin v. C.N.R. Co.**, 21 C.R.C. 437.

The Board has power to order a station to be provided, though the railway has been completed. **G.T.R. v. Dept. of Agriculture**, 10 C.R.C. 84; 42 S.C.R. 557.

See note on this case under sec. 33, *supra*. The words "or authorised" on which it depended have been struck out of 33 (2) but on the other hand the Board's powers under section 188 have been enlarged by the addition of sub-section 3 of the latter section.

The Board has no power to compel railway companies to install telephones, as "facilities" at stations; **Province of Manitoba v. C.P.R. Co.**, 21 C.R.C. 445.

The Board has no power to compel railway companies to change the names of stations.

Board's circular No. 189, 29th March, 1920.

The Board's power as to installation of stations is not so much one of initial discretion as of regulative power with regard to an apparently improper exercise by the Company of the discretion which it has under the Act. **Kelly v. G.T.R. Co.**, 24 C.R.C. 367.

See **Re Lord's Day Act and C.P.R.**, 11 C.R.C. 193.

The Board, having power to say what provisions of the Act apply to telephone lines, has power to compel a provincial telephone company to observe standard regulations when crossing a Dominion telephone line. **Bell Telephone Co. v. Nipissing Co.**, 9 C.R.C. 473.

The Board has power to compel railway companies to permit telephone installation at stations; but not to compel them to install telephones themselves as "facilities." **People's Telephone Co. v. G.T.R. and C.P.R.**, 9 C.R.C. 161; **Towns of Port Arthur and Fort William v. Bell Co. and C.P.R. Co.**, 4 C.R.C. 279; **Province of Manitoba v. C.P.R. Co.**, 21 C.R.C. 445.

The Board has jurisdiction to regulate telegraph tolls. **Western Associated Press v. C.P.R.**, 9 C.R.C. 482.

The Board held it had no jurisdiction at instance of provincial telephone company, to entertain complaint of discrimination by Dominion company in favor of another provincial company. **Port Hope Tel. Co. v. Bell Tel. Co.**, 17 C.R.C. 343.

The Board has jurisdiction to order a Dominion telephone company to give another telephone company, whe-

Sunday
work.

Telephones
and
telegraphs.

ther Dominion or provincial, long distance connection on specified terms; but not as to local business. **Ibid; Bell Co. v. Falkirk Tel. Co.**, 20 C.R.C. 256.

See also, as to telephones, **Ingersoll Co. v. Bell Co.**, 22 C.R.C. 135; **Windsor v. Bell Co.**, 22 C.R.C. 416; **Alberta United Farmers v. C.P.R.**, 23 C.R.C. 104; **Tinkess v. Bell Co.**, 20 C.R.C. 249; **North Lancaster Exchange v. Bell Co.**, 21 C.R.C. 220; **Joliette Tel. Co. v. Bell Tel. Co.**, 21 C.R.C. 443; **Prov. of Manitoba v. C.P.R. Co.**, 21 C.R.C. 445.

No jurisdiction to order wires underground for aesthetic reasons. **Woodstock v. G.N.W. Telegraph Co.**, 19 C.R.C. 429.

Nor over tracks outside of territory covered by company's charter. **Kelowna v. C.P.R.**, 15 C.R.C. 441.

Territorial
limitations.

The Board has no jurisdiction over tolls on lines in foreign territory. **Dominion Sugar Co. v. Can. Freight Assn.**, 14 C.R.C. 188; **Saskatchewan Bridge Co. v. S.S. Marie Ry. Co.**, 19 C.R.C. 443; **C.N.R. v. G.T.R. and C.P.R.**, 10 C.R.C. 139; **Smart-Woods v. C.P.R.**, 17 C.R.C. 340.

The Board has no jurisdiction to prevent the use by railway companies of any specific time, unless such use is shown to be against comfort, convenience or safety of employees or the public: **Daylight Saving Case**, 24 C.R.C. 199.

Time tables.

The Board is not the proper forum to determine questions of title to land. **Greenfield Co. v. Hetherington**, 16 C.R.C. 444.

Title to land.

The Board has no jurisdiction to order installation of milling or refining-in-transit rates, or to regulate them except where they discriminate unjustly or are unreasonable. **Dominion Sugar Co. v. Freight Assn.**, 14 C.R.C. 188.

Tolls.

The Board has no power to regulate an international rate except as to the portion of the route within Canada. **Ibid**; see also **Niagara, etc., Ry. Co. v. Davy**, 43 S.C.R. 277.

The Board may make declaratory orders as to what are proper tolls. **G.T.R. and C.P.R. Cos. v. Can. Oil Cos.**, 14 C.R.C. 201, affirmed 17 C.R.C. 411; (1914) A.C. 1022; 19 D.L.R. 64.

The Board may declare that charges collected under a published tariff were excessive, but cannot order refund or publication of amended tariff for reparation purposes, but may authorise refund upon the railway com-

pany's consent: **Imperial Munitions v. C.P.R.**, 24, C.R.C. 169.

The Board can control cartage charges made or authorised by railway companies. **In re Cartage Tolls**, 14 C.R.C. 372; **Stewart v. C.P.R.**, 11 C.R.C. 197.

The Board has no power to regulate tolls for purpose of equalising cost of production or geographical, climatic or economic conditions. **Imperial, etc., Co. v. C.P.R.**, 14 C.R.C. 375; **Hudson Bay Mining Co. v. G.N.R. Co.**, 16 C.R.C. 254; **Canadian China Clay Co. v. G.T.R. Co.**, 18 C.R.C. 347; **Western Retail Lumbermen's Assn. v. C.P.R. et al.**, 20 C.R.C. 155; **Dominion Millers' Assn. v. Can. Freight Assn.**, 21 C.R.C. 83.

The Board's jurisdiction over tolls is as to their reasonableness, not as to their effect on industrial development (citing numerous cases). **Crushed Stone Co. v. G.T.R. Co.**, 23 C.R.C. 132; **Southern Alberta Hay Growers v. C.P.R.**, 21 C.R.C. 226; **Town of Waterloo v. G.T.R. Co.**, 24 C.R.C. 143.

The Board cannot compel a company to give excursion or convention rates or fix the number of persons entitled thereto; **Can. Fraternal Assn. v. Can. Pass. Assn.**, 13 C.R.C. 178; **Roy v. Can. Pass. Assn.**, 17 C.R.C. 320.

The Board cannot compel reduction in tolls from initial points in U.S. to points in Canada. **Continental, etc., Co. v. C.P.R. Co.**, 13 C.R.C. 156.

The Board cannot order refund of illegal charges, **Currie v. C.P.R.**, 13 C.R.C. 31; **United Grain Growers v. C.N.R.**, 26 C.R.C. 26.

The Board has no jurisdiction over tolls in foreign territory. **Saskatchewan Bridge Co. v. S.S. Marie Ry. Co.**, 19 C.R.C. 443.

As to jurisdiction over joint international tariffs in reciprocity with Interstate Commerce Commission, see **Consolidated Gas Co. v. C.P.R. Co.**, 26 C.R.C. 11; and see also **G.T.R. v. British American Oil Co.**, 43 S.C.R. 311.

The Board's jurisdiction over joint tariffs of Canadian and foreign railways depends as to the portion of the route outside Canada, on the concurrence of the foreign railways concerned. **Davy v. Niagara, etc., Ry. Co.**, 12 C.R.C. 61; **Stockton v. Dom. Exp. Co.**, 13 C.R.C. 459; **Brit. Am. Oil Co. v. G.T.R. Co.**, 9 C.R.C. 178.

The Board cannot compel filing of through passenger tariffs from frontier points in U.S. to Canadian points.

C.N.R. v. G.T.R. and C.P.R., 10 C.R.C. 139.

The Board's jurisdiction to allow increase of tolls in the public interest is not ousted by agreements between companies and municipalities limiting the tolls to be charged. **Montreal, etc., Ry. Co. v. Towns of Greenfield Park**, 23 C.R.C. 106.

Prior agreements limiting tolls, validated by a Special Act of Parliament, declaring a railway to be for the general advantage of Canada, are binding on the Board. **Increase in Rates Case**, 22 C.R.C. 49; **Hamilton Radial Co. v. Hamilton**, 23 C.R.C. 114.

The Board has no power to regulate tolls for carriage wholly by water, by a steamship company subsidiary to a railway company. **Residents of Massett v. G.T.P.S.S. Co.**, 23 C.R.C. 121.

Otherwise when the carriage is under railway's control: **Currie v. C.P.R.**, 13 C.R.C. 31.

The Board has no power to vary the U.S. Official Classification as to traffic between U.S. and Canadian points. **Graham v. Can. Freight Assn.**, 22 C.R.C. 355.

The Board has no power to allow a company to charge tolls for general business during construction, before railway opened for traffic. **Riverside, etc., Co. v. C.P.R.**, 18 C.R.C. 17.

It is not the function of the Board to decide whether a section of the Railway Act conferring jurisdiction upon it is within the power of Parliament to enact. **Auger v. G.T.R. and C.P.R. Cos.**, 19 C.R.C. 401. Ultra Vires.

Nor to pass upon the validity of a Dominion Act, authorising use of city streets by a telephone company without compensation. **Bell Telephone Co. v. City of Ottawa**, 22 C.R.C. 421.

Some decisions upon the jurisdiction of the Railway Committee under the Act of 1888 are collected in 1 Can. Ry. Cas. as follows:

Toronto v. Metropolitan Ry. Co., p. 63. Powers of Committee are confined to approving mode and place of crossing or junction of railways.

G.T.R. v. Toronto, p. 82. Committee cannot delegate its powers.

Ottawa etc., Ry. Co. v. Atlantic, etc., Ry. Co., p. 101. Court will not interfere with a matter in which committee has jurisdiction, e.g., conflicting surveys and location of railway lines.

Also **G.T.R. v. Hamilton, etc., Co.**, 29 O.R. 143. Committee under its exclusive jurisdiction could authorise crossing at grade against will of plaintiffs.

Credit Valley Ry. Co. v. G.W. Ry. Co., 25 Gr. 507. Statutory requirement of Committee's approval cannot be waived by consent.

C.P.R. v. Northern Pacific Ry. Co., 5 Man., L.R. 301. Such approval must be obtained, not merely applied for.

See also note to **Frontenac v. G.T.R.**, 4 C.R.C. at p. 111.

Power to
make orders
and
regulations.

34. (1) The Board may make orders or regulations,—

- (a) with respect to any matter, act or thing which by this or the Special Act is sanctioned, required to be done, or prohibited;
- (b) generally for carrying this Act into effect;
- (c) for exercising any jurisdiction conferred on the Board by any other Act of the Parliament of Canada.

Application.

(2) Any such orders or regulations may be made to apply to all cases or to any particular case or class of cases, or to any particular district, or to any railway or other work, or section or portion thereof; and the Board may exempt any railway or other work, or section or portion thereof, from the operation of any such order or regulation for such time or during such period as the Board deems expedient; and such orders or regulations may be for such time as the Board deems fit, and may be rescinded, amended, changed, altered or varied as the Board thinks proper.

Penalties.

(3) The Board may by regulation or order provide penalties, when not already provided in this Act, to which every company or person who offends against any regulation or order made by the Board shall be liable.

Other
liability.

(4) The imposition of any such penalty shall not lessen or affect any other liability which any company or person may have incurred. R.S., c. 37, s. 30, part. Am.

The Act of 1906 (sec. 30) had "and" instead of "or" in the first line.

Sub-sections a, b, c, d, e, f, g, of section 287, *infra*, were formerly part of section 30 of the Act of 1906, to which this section corresponds.

Sub-section 1 (c), above is new. See note on sec. 33.

Sub-section 2 has been amended by inserting after the words "apply to," the words "all cases or to any particular case or class of cases," by inserting the words "or other work" in two places after the word "railway"; and by adding the clause at the end, beginning "and such orders or regulations."

In *Re C.N.R. and Board of Ry. Commissioners*, 10 C.R.C. 104, 42 S.C.R. 443, an order of the Board requiring all railways to fence their right of way was held **ultra vires**, as the section (254 of 1906), authorising such an order contemplated a judicial enquiry by the Board as to specific localities.

Even with the words "all cases, etc.," inserted, the section will probably be found to be subject to a similar limitation in some instances; and it is doubtful whether the amendments will give any jurisdiction beyond what the Board has been exercising in the past, in the making of General Orders.

Evidently this section "is intended to authorise the making of orders or regulations of a general character (even though in some cases limited in operation) governing railway companies and their operations in many details not expressly provided for by the Act." **Duthie v. G.T.R.**, 4 C.R.C. 304.

Sub-section 3 has been extended to cover offences against "any regulation or order made by the Board" instead of merely "any regulation made under this section"; and a proviso limiting the penalty to \$100 has been struck out, having been criticised in committee as inadequate in some cases, and perhaps conflicting with other sections of the Act. See further as to penalties for disobeying orders of the Board or its officers, secs. 385, 389, 392, 393, 402, 410, 411, 425, 437, 438, 439, 445, 446, 447, 448.

In making orders and regulations under this section (sections 23 and 25 of the Act of 1903) the Board is not to adjudicate in respect to rights arising out of past transactions, but to lay down rules for future conduct. The Board is not empowered to award damages or any other relief for any injury caused by an infraction of the Act. **Duthie v. G.T.R.**, 4 C.R.C. 304.

Such claims for damages should be prosecuted in the Provincial Courts: **Ibid.**

The Board has no power under this section or sec. 33 to compel a railway company to construct works merely

for a landowner's benefit; or to prevent flooding for which the railway is not responsible. **Trites v. C.P.R.**, 21 C.R.C. 1.

Jurisdiction
of Board
as to
agreements.

35. Where it is complained by or on behalf of the Crown or any municipal or other corporation or any other person aggrieved, that the company has violated or committed a breach of an agreement between the complainant and the company—or by the company that any such corporation or person has violated or committed a breach of an agreement between the company and such corporation or person,—for the provision, construction, reconstruction, alteration, installation, operation, use or maintenance by the company, or by such corporation or person, of the railway or of any line of railway intended to be operated in connection with or as part of the railway, or of any structure, appliance, equipment, works, renewals or repairs upon or in connection with the railway, the Board shall hear all matters relating to such alleged violation or breach, and shall make such order as to the Board may seem reasonable and expedient, and in such order may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as constitute a violation or a breach thereof. 1909, c. 32, s. 1. Am.

The words “having regard to all the circumstances of the case” have been omitted from before “reasonable and expedient.”

This section, enacted by 7-8 Edw. VII., c. 61, sec. 8, amended by 8-9 Edw. VII., c. 32, sec. 1, was an important encroachment upon the jurisdiction of the Provincial Courts and upon the principle laid down in **Duthie v. G. T.R.**, 4 C.R.C. 304, that the Board is not to adjudicate in respect to rights arising out of past transactions. But its powers seem still to be limited to directing what is to be done in the future; it is submitted that the Board is not empowered by this section to award damages for breach of the agreements mentioned; though an order to pay damages might be deemed “reasonable and expedient.” The principles upon which the Board may act under this section are apparently very different from those which would govern the Provincial Courts. The Board is to make such order as may seem “reasonable and expedi-

ent," and may exercise its "discretion" as to whether the agreement in question shall be enforced or not. What circumstances shall be allowed to influence the Board's discretion can only be determined by experience; but it seems clear that its decision need not always accord strictly with the agreement. It has held in several cases that it is not bound by agreements between parties who appear before it when it is necessary to over-ride them in order to carry out the intention of the Act in the public interest, e.g., **Increase in Rates Case**, 22 C.R.C. 49; **City of Vancouver v. Vancouver, etc., Ry. Co.**, 20 C.R.C. 72.

The Board has judicial discretion under section 35 to make an order for specific performance of agreements. Its functions under this section are not those of a Court of Equity but are auxiliary to its general administrative jurisdiction. It should enquire into the whole subject matter and enquire what would be the reasonable and expedient order to make having regard to all the circumstances of the case. **City of Montreal v. G.T.R. Co.**, 25 C.R.C. 448.

In **Re Reid & Canada Atlantic Ry. Co.**, 4 C.R.C. 272, the Board held that the Act of 1903 did not empower it to enforce specific performance of an agreement to make and maintain highway crossings over its right of way. The present section is probably wide enough to cover such a case.

Specific breach of an agreement must be shown to give the Board jurisdiction under this section. **Hamilton v. G.T.R.**, 21 C.R.C. 211.

The Board has power under this section to compel a railway company to carry out an agreement to supply adequate and suitable tank car equipment for carriage of refined oil. **Empire Refining Co. v. Pere Marquette Ry. Co.**, 10 C.R.C. 158.

The Board will not interfere in a dispute between railway companies and transfer companies as to contractual rights where no public interest involved. **City Transfer Co. v. C.P.R.**, 19 C.R.C. 427.

The Board refused to interpret or enforce an agreement by a railway company to indemnify a municipality against claims by landowners arising out of construction of crossings ordered by the Board. **Calgary v. C.N.R. Co.**, 18 C.R.C. 25.

It is not all agreements made by railway companies that are brought under the Board's jurisdiction, but only those relating to the company's obligations with respect to its railways and their use and operation. The or-

dinary contractual obligations of railways are left to the appropriate Courts. **City of Victoria v. Esquimalt, etc., Ry. Co.**, 24 C.R.C. 84.

Board may
act upon its
own motion.

36. The Board may, of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act. R.S., c. 37, s. 28 (1).

This section does not empower the Board to direct of its own motion the construction of works of which the Act merely authorises it to approve the construction upon the application of a railway company. **Hamilton v. T. H. and B. Co.**, 17 C.R.C. 370; 50 S.C.R. 128; reversing, s.c., 17 C.R.C. 353.

See note to section 33 (2).

Under this section and sec. 257, the Board may of its own motion direct elimination of grade crossings; and for that purpose may close streets or direct a municipality to close them. **Brant v. C.P.R.**, 20 C.R.C. 268; 36 O.L.R. 619; 30 D.L.R. 782; **Toronto Ry. Co. v. City of Toronto and C.P.R.**; 20 C.R.C. 280; 53 S.C.R. 222; 30 D.L.R. 86.

Jurisdiction of the Board was upheld under this section when objection was made that applicant in whose favour an order was made had no status before it; and leave to appeal was refused; **G.T.P. Co. v. Purcell**, 15 C.R.C. 314.

From time
to time.

37. Any power or authority vested in the Board may, though not so expressed, be exercised from time to time, or at any time, as the occasion may require. R.S., c. 37, s. 28 (2). Am.

The Act of 1906 had the words "under this Act" after "Board" and the words "in this Act" after "expressed." See note following sec. 33 (4).

Governor in
Council may
refer to
Board for
report
or action.

38. The Governor in Council may at any time refer to the Board for a report, or other action, any question, matter or thing arising, or required to be done, under this Act, or the Special Act, or any other Act of the Parliament of Canada, and the Board shall without delay comply with the requirements of such reference. R.S., c. 37, s. 57. Am.

The words "or any other Act of the Parliament of Canada" are new.

39. (1) When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

Works
ordered by
the Board.

(2) The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid. R.S., c. 37, s. 59. Am.

Cost, by
whom paid.

The Act of 1906 had, after the words "vested in it" in sub-sec (1), the words "by this Act or the Special Act." See notes to sec. 33 (4).

The words "except as otherwise expressly provided" where they occur in sub-secs. (1) and (2) are new. See secs. 260, 270 (5).

The words "or permits" in sub-sec (1) are new. In **B.C. Electric Ry. Co. v. V. V. and E. Ry. Co.** [1914] A.C. 1067, some stress was laid on the fact that the order of the Board, which in that case was held *ultra vires*, was merely a permissive order, allowing the municipality to carry streets across the railway.

Read in this connection section 33 (5) providing that the decision of the Board as to whether any company, municipality or person is or is not a "party interested" shall be binding and conclusive; and notes immediately following that section.

Occasion for exercise of the powers of the Board, under this section, as of the Railway Committee under the

Act of 1888 in similar cases, will most frequently arise under sections 256 and 257.

See **Re C.P.R. and Township and County of York**, 1 C.R.C. 36-47; 27 O.R. 559; 25 A.R. 65.

The Board, in dealing with the question of compensation to be paid for the taking of land under section 139 of the Act of 1903 (now section 200 *infra*), may require the applicants to do any act whatever, including the payment of money, in addition to the compensation ordinarily allowed under the statute, but such additional compensation should be allowed only under very peculiar circumstances. **Burnt District Case**, 4 C.R.C. 290.

The power of the Board under section 186 of the Act of 1903 (now section 256, *infra*), to order a highway to be carried over or under a railway extends to highways already in existence as well as to new highways. **Ottawa Electric Ry. Co. v. Ottawa**, 37 S.C.R. 354; 5 C.R.C. 131.

The application may be made by the municipality as well as by the railway: **Ibid**.

See the same case as to "party interested or affected," also 5 C.R.C. 138 and 161; 7 C.R.C. 73 and 9 C.R.C. 154.

As to the principles on which the Board acts in apportioning cost of works ordered, see **Bank Street Subway Case**, 5 C.R.C. 126.

The Board in granting leave to the James Bay Company to carry its line under the track of the Grand Trunk Company imposed as a condition that the masonry work should be sufficient to carry an additional track of the Grand Trunk Company. No evidence was given of the intention to lay such additional track. Held, that the Board had jurisdiction to impose the condition. **James Bay Ry. Co. v. G.T.R.**, 37 S.C.R. 372; 5 C.R.C. 164.

The jurisdiction of the Board under this section to require a provincial street railway company to contribute to the cost of grade separation at a highway crossing was upheld by the Supreme Court. **Toronto Ry. Co. v. City of Toronto**, 20 C.R.C. 280; 53 S.C.R. 222; 30 D.L.R. 86; and leave to appeal to the Privy Council was refused.

See also **Brant v. C.P.R.**, 20 C.R.C. 268.

The Board, however, was held to have no jurisdiction to order a tramway company to pay part of cost of grade separation, solely because the tramway company would be benefited, when the separation was authorised, by a merely permissive order, made on an application by the municipality for leave to carry streets by means of via-

ducts over a steam railway, and for an order apportioning cost between the steam railway and the municipality. **B.C. Electric Ry. Co. v. V. V. & E. Ry. Co.**, 48 S.C.R. 98; 18 C.R.C. 287; (1914) A.C. 1067; 19 D.L.R. 91; distinguished, **Toronto Ry. Co. v. Toronto**; 53 S.C.R., 222.

40. Whenever any Act of the Parliament of Canada requires or directs that before the doing of any work the approval of the Board must be first obtained, and whenever any such work has been done without such approval, the Board shall nevertheless have power to approve of the same and to impose any terms and conditions upon such company that may be thought proper in the premises: Provided that where the doing of such work affects the safety of the public or the employees, no such approval shall be given without due notice and hearing. 1910, c. 50, s. 2. Am.

Approval of
certain
works after
construction.

Under this section as at first enacted, 9-10 Edw. VII., c. 50, sec. 2, the Board had no power to approve works constructed without approval after 31st December, 1909. **Re Prince Rupert Location of G.T.P. Ry. Co.**, 13 C.R.C. 153; **Re G.T.P. Ry. Co. Branch Lines**, 14 C.R.C. 12. But the section has now been amended so as to give the Board power, after due notice and hearing, to approve in such cases and to impose terms and conditions. The Act of 1910 had "this Act" instead of "any Act of the Parliament of Canada." See note to sec. 33 (4).

The words from "Provided" to the end of the section are new. Compare section 41, and see notes on that section.

In **City of Maisonneuve v. C.N. Ry. Co.**, 22 C.R.C. 446, the Board legalized a highway crossing which had been made without being legally established. But, in some cases, when works requiring leave have been constructed by a railway company without leave being applied for, the Board has declined to entertain later applications by the company with reference to them, leaving it to work out the situation as best it might. **Kleinburg Crossing Case**, 27 Jan., 1909.

41. When any work, act, matter or thing is, by any regulation, order or decision of the Board, required to be done, performed or completed within a specified time, the Board may, if the circumstances of the case in its opinion so require, upon notice and hearing or, in its discretion,

Extension of
time specified
by Board.

upon **ex parte** application, extend the time so specified; but where such regulation, order or decision requires any Act, matter or thing to be done, for the safety of the public or the employees of the railway, no extension shall be granted without hearing on notice. R.S., c. 37, s. 50; 1917, c. 37, s. 3. Am.

The concluding words of this section were added at the instance of the railway employees, who objected to **ex parte** orders being made extending the time limited by the Board for installing safety appliances. The language is very indefinite as to the notice to be given. Presumably it should be given to the parties represented on the original application.

In authorising the taking of lands under section 139 of the Act of 1903 (now section 200) the Board made it a term that upon notice given by the land owner within a limited time the railway company should pay compensation in a certain way. The land owner failed to give notice. An application to extend the time was refused on the ground that the company had acquired a vested right under the order to take the land on statutory terms. **Eckardt v. G.T.R.**, 7 C.R.C. 90.

Employment
of counsel
in public
interest.

42. The Board may, in any application, proceeding or matter of special importance pending before it, if in the opinion of the Board the public interest so requires, apply to the Minister of Justice to instruct counsel to conduct or argue the case or any particular question arising in the application, proceeding or matter as to any public interest which is or may be affected thereby or by any order or decision which may be made therein; and, upon such application to him by the Board, or of his own motion, the Minister of Justice may instruct counsel accordingly. 1907, c. 38, s. 1.

This section as passed in 1907 had the following after the word "accordingly"; "And the Board may direct that the costs of such counsel shall be paid by any party to the application, proceeding or matter, or by the Minister of Finance out of any unappropriated moneys." This clause, it was thought, might work a hardship on parties appearing before the Board. On the other hand, the suggestion was made, but not adopted, that the Board should be given power to provide counsel for parties unable to pay for legal assistance. The Board's

practice is not to allow costs to parties appearing before it. See notes to sec. 61.

43. (1) The Board may of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor in Council, state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law or of the jurisdiction of the Board.

Stated case
for Supreme
Court of
Canada.

(2) The Supreme Court of Canada shall hear and determine such question, and remit the matter to the Board with the opinion of the Court thereon. R.S., c. 37, s. 55. Am.

Proceedings
thereon.

Heretofore the Board has had power to submit questions of law only; the words "or of the jurisdiction of the Board" are now added.

The words "such question" in sub-section 2 have been substituted for "the question or questions of law arising thereon;" the intention being, apparently, to limit the function of the Supreme Court to the consideration of the precise question certified by the Board, in the stated case, to be in its opinion a question of law or of jurisdiction.

Though a question of jurisdiction may be regarded as a question of law, the Board refused in **City of Prince Albert v. C.N. Ry. Co.**, 11 C.R.C. 200, to submit such a question to the Supreme Court, under section 55 of the Act of 1906, holding that the proper course was to apply to a Judge of the Supreme Court. But it was held in **City of Hamilton v. T. H. and B. Ry. Co.**, 17 C.R.C. 370; 50 S.C.R. 128, following **Essex, etc., Ry. Co. v. Windsor, etc., Ry. Co.**, 8 C.R.C. 1; 40 S.C.R. 620, that section 55 (1906) conferred upon the Board authority of its own motion to state a case upon any question of jurisdiction, which in the opinion of the Board was a question of law. The amendment puts the matter beyond discussion.

Jurisdiction may also be questioned by appeal to the Supreme Court under sub-section (2) or sub-section (3) of section 52, *infra*.

In considering when a case upon a question of law can be submitted for the opinion of the Supreme Court, the enquiry is suggested,—What is a question of law? The distinction between law and fact is subtle, and sometimes

a question of no little difficulty. The difficulty lies not in determining what the law is, or what the fact is, but whether the given law is applicable to the given fact. (Austin on Jurisprudence, 1873, Vol. 1, p. 236). As examples of questions of law arising for decision upon findings of fact by a County Court Judge, under the Workmen's Compensation Act, 1897 (Imp.), 60 & 61 Vic., cap. 37, see **Hodinott v. Newton** (1901), A.C. 49, p. 68, where the construction constituting a scaffolding within the meaning of section 7 of the Act was treated as a question of law. Also **Maud v. Brook** (1900), 1 Q.B. 581. Whether a bicycle was a carriage within the meaning of the Highway Act was treated as a question of law in **Taylor v. Goodwin**, 4 Q.B.D. 228. The law is the rule or standard, but the facts are the varying circumstances which conform or not with such rule or standard. It is a question of law (1) whether any such rule or standard exists; (2) whether, if such rule or standard exists, the state of facts found by the inferior court falls within such rule or standard. See **Roper v. Greenwood** (1900), 83 L.T. 471. The meaning of words in an Act of Parliament is a question of law, not a matter of evidence. The legal meaning, *i.e.*, the proper construction to be placed upon words or sentences in a statute, does not necessarily coincide with the ordinary meaning, *e.g.*, the word "place" in a statute forbidding betting in any "house, office, room or other place." **Powell v. Kempton Park Co.** (1897), 2 Q.B. 242. Definitions are often the subject of legal argument; as "cruelty" in **Russell v. Russell** (1897), A.C. 395. In Boulton on "The Law and Practice of a Stated Case" (1902), pp. 120-129, a number of cases are given of questions of law, *e.g.*, **Milner v. G. N. Ry. Co.** (1900), 1 Q.B. 795: whether a refreshment room at a station was part of the railway station: *c.f.*, "Railway station," **Carroll v. Casemore**, 20 Grant 16: whether a bookstall at a station, consisting of a board and trestles, was a shop within the meaning of the Shop Hours Act, 1892, 55 & 56 Vic., cap. 62; "Minerals," **Scott v. Midland R.W. Co.** (1901), 1 K.B., 317, 70 L.J.Q. B. 228.

See "Words and Terms," Digest of Ontario Law (1904), Vol. IV., pp. 7707-43; Stroud's Judicial Dictionary (1903), 2nd Edition.

By section 317 the Board may determine, as **questions of fact**, what are "substantially similar circumstances," "undue preferences," etc., within the meaning of the Act.

For examples of cases stated by the Board see 6 C.R.C.

327, 8 C.R.C. 1. See also **Essex Terminal Ry. Co. v. Windsor, etc., Ry. Co.**, 40 S.C.R. 620; **Hamilton v. T. H. and B. Ry.**, 50 S.C.R. 128.

44. (1) In determining any question of fact, the Board shall not be concluded by the finding or judgment of any other court, in any suit, prosecution or proceeding involving the determination of such fact, but such finding or judgment shall, in proceedings before the Board, be *prima facie* evidence only.

Effect of
judgment of
other courts.

(2) The pendency of any suit, prosecution or proceeding, in any other court, involving questions of fact, shall not deprive the Board of jurisdiction to hear and determine the same questions of fact.

Lis pendens.

(3) The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive. R.S., c. 37, s. 54.

Findings of
fact
conclusive.

A finding of fact by the Board on a question within its jurisdiction to determine (for example, that a railway company had refused to afford reasonable facilities) is conclusive. **Robinson v. C.N.R.**, 11 C.R.C. 289; 19 Man. L.R. 300.

The decision of the Board as to whether a municipality is or is not a party interested is made by the statute (see sec. 33, sub-sec. 5) binding and conclusive. It is a question of fact to be determined upon all the circumstances of each case. **County of Carleton v. City of Ottawa**, 9 C.R.C. 154; 41 S.C.R. 552.

The decisions of the English Railway and Canal Traffic Commission were held binding upon it as a Court: **Didcot Ry. Co. v. G.W. Ry. Co.**, 9 Ry. and Can. Tr. Cas., 210 at p. 229; **Pickfords Co. v. London, etc., Ry. Co.**, 21 T.L.R. 223; 12 Ry. and Can. Tr. Cas. 154.

Orders and Decisions.

45. (1) The Board may direct in any order that such order or any portion or provision thereof, shall come into force at a future time or upon the happening of any contingency, event or condition in such order specified, or upon the performance to the satisfaction of the Board, or a person named by it, of any terms which the Board may impose upon any party interested, and the Board may direct that the whole, or any portion of such order,

Orders may
come into
force,—

Upon
contingency;

Upon terms;

For limited
time.

shall have force for a limited time, or until the happening of a specified event.

Interim
orders.

(2) The Board may, instead of making an order final in the first instance, make an interim order, and reserve further directions either for an adjourned hearing of the matter, or for further application. R.S., c. 37, s. 47.

This section enlarges the powers of the Board as to making contingent, temporary, or *ex parte* orders beyond those of the Railway Committee under the Act of 1888.

See **G.T.R. v. Toronto**, 1 C.R.C. at p. 92; **G.T.P.R. Co. v. Fort William**, 43 S.C.R. 412.

See also, as to temporary orders, sec. 34 (2).

Notwithstanding the general and apparently comprehensive language of sub-section 1, the Privy Council held, reversing a majority of the Supreme Court of Canada, that the Board had no power to direct payment of compensation to landowners as a condition of an order allowing a railway company to lay tracks upon a highway, as the section "cannot be interpreted as being designed to alter the other and specific provisions of the statute as to the compensation payable by the railway company." **G.T.P. Ry. Co. v. Fort William Landowners**, 13 C.R.C. 187; [1912] A.C. 224.

But see, now, sec. 255.

Following the Fort William case, the Board held that it had no power to impose compensation or other conditions as a term of allowing a telephone company to construct upon a highway. **Bell Telephone Co. v. City of Ottawa**, 22 C.R.C. 421.

An order imposing conditions beyond the power of the Board to make is void, unless the conditions are accepted. **C.N. Ry. Co. v. Taylor**, 15 C.R.C. 298.

Relief.

46. Upon any application made to the Board, the Board may make an order granting the whole or part only of such application, or may grant such further or other relief, in addition to or in substitution for that applied for, as to the Board may seem just and proper, as fully in all respects as if such application had been for such partial, other, or further relief. R.S., c. 37, s. 48. Am.

The Act of 1906 had "under this Act" after "Board" in the first line. See note to sec. 33 (4).

47. The Board may, if the special circumstances of any case so require, make an interim **ex parte** order authorising, requiring or forbidding anything to be done which the Board would be empowered, on application, notice and hearing, to authorise, require or forbid; but no such interim order shall be made for any longer time than the Board may deem necessary to enable the matter to be heard and determined. R.S., c. 37, s. 49.

Compare sec. 41.

48. No order of the Board need show upon its face that any proceeding or notice was had or given, or any circumstance necessary to give it jurisdiction to make such order. R.S., c. 37, s. 53.

49. (1) Any decision or order, made by the Board may be made a rule, order or decree of the Exchequer Court, or of any superior court of any province of Canada, and shall be enforced in like manner as any rule, order or decree of such court.

The Act of 1906 had "under this Act" after Board.
See note to sec. 33 (4).

Such an order is usually made after notice to the parties interested and its execution may be suspended pending litigation respecting the rights of the parties in another court.

Re Metropolitan R.W. Co., 1 Can. Ry. Cas. 96.

See *In re G.T. Ry. Co.*, 8 Ex. C. 349.

(2) To make such decision or order a rule, order or decree of any such court, the usual practice and procedure of the court in such matters may be followed; or, in lieu thereof, the Secretary may make a certified copy of such decision or order upon which shall be made the following endorsement signed by the Chief Commissioner and sealed with the official seal of the Board:—

“To move to make the within a rule (order or decree, as the case may be) of the Exchequer Court of Canada (or as the case may be).

"Dated this _____ day of _____ A.D. 19____

"A.B."

[Seal.] "Chief Commissioner of the Board of Railway
Commissioners for Canada."

As to signature by Chief Commissioner, see secs. 10 (5) and 11.

Copy to the registrar.

(3) The Secretary may forward such certified copy, so endorsed, to the registrar, or other proper officer of such court, who shall, on receipt thereof, enter the same as of record, and the same shall thereupon become and be such rule, order or decree of such court.

Intended for a case where the Board acting *ex parte* seeks to enforce its own order. 4th Ann. Rep. 207.

When order rescinded or changed.

1888, c. 29.

(4) When a decision or order of the Board under this Act, or of the Railway Committee of the Privy Council under **The Railway Act, 1888**, has been made a rule, order or decree of any court, any order or decision of the Board rescinding or changing the same shall be deemed to cancel the rule, order or decree of such court, and may, in like manner, be made a rule, order or decree of such court.

The words "under this Act" in the first line have probably been retained by oversight. See note on sub-sec. (1).

Optional to enforce otherwise.

(5) It shall be optional with the Board, either before or after its decision or order is made a rule, order or decree of any court, to enforce such decision or order by its own action. R.S., c. 37, s. 46. Am.

Sub-sec. 5 is new. In committee, during revision of the Act, a question was asked as to how the Board could enforce its decisions or orders, having none of the ordinary machinery of a Court for that purpose. The Minister of Railways suggested that the Board might refuse to allow a recalcitrant railway to operate at all. That is more than doubtful; and the sub-section appears to be of little value. Its intention was "to make it clear that the fact that an order of the Board has been made a rule of Court does not prevent the adoption of other means of enforcing the order." (Draughtsman's notes on Senate Bill B 2).

A discussion took place before the Special Committee of Parliament revising the Act as to the power of the Dominion Parliament to enact this section, the suggestion being made that as the constitution of provincial courts is within the exclusive jurisdiction of the provinces under Section 92 (14) of the British North America Act,

Parliament could not require any such court to make an order of the Board a rule of Court or enforce it as such. This Act and other Acts impose duties upon judges of provincial courts; (see, for instance, Secs. 217, 219 and 239); but it was contended that these duties were discharged by them as *personae designatae* (**C.P.R. v. Little Seminary of Ste. Therese**, 16 S.C.R. 606). It was stated before the Committee that orders of the Board had been made rules of the Exchequer Court but never of any provincial Court,—this was an error: See **C.P. Ry. Co. v. Tp. of York**, 1 C.R.C. 36, 47; 27 O.R. 559; 25 A.R. 65; also **City of Toronto v. G.T. Ry. Co.**, 37 S.C.R. 232, at p. 235)—and it was suggested that no means existed for compelling the provincial courts to comply with the section. The Bankruptcy Act and the Winding Up Act were cited as cases in which Parliament had availed itself of the machinery of the Provincial Courts. The point was afterwards raised in **re City of Toronto and the Toronto Railway Co. (Queen Street High Level Bridge Case)**: 42 O.L.R. 82; 43 D.L.R. 739. An order of the Board requiring the Toronto Railway Company to contribute to the cost of a bridge was made a rule of the Supreme Court of Ontario and the City proceeded to enforce it by execution. The Railway Company moved for an order staying execution on the ground, *inter alia*, that the order was not lawfully an order of the Supreme Court of Ontario, the procedure of the Court being a matter for the Province and not for the Dominion. Middleton, J., in refusing the application said: “The Dominion Act, I think, makes the provincial courts, so far as their executive and ministerial officers are concerned, ancillary to the Court or Board constituted by the Act for the purpose of determining the rights which come within the purview of the statute. These rights, determined by the Dominion tribunal, are to be enforced by the machinery of the provincial courts. The decree of the Board, on being presented to the registrar of the provincial court, is to be entered of record and thus becomes automatically a judgment of the court, to be enforced in the same way as an ordinary judgment pronounced in due course. This is a simple and convenient mode of enforcing the judgment of the court and many analogies may be found. This in effect means no more than the adoption by the Dominion of the machinery provided by the province. That the Dominion may provide for the enforcement of the decrees of its Courts or Boards is beyond question and I can see no reason why the course here adopted should be regarded as incompetent. But this does not give to the provincial judiciary any control over orders of the Board so directed to be

enrolled and enforced. When an Irish or Scotch judgment is enrolled in England, for the purpose of issuing execution there, this does not confer upon the English Court any jurisdiction to interfere with the judgment."

This case afterwards went to the Privy Council by way of appeal from the orders of the Board and from the order of Middleton, J., and his judgment was sustained: 46 O.L.R. 452.

In Canada
Gazette.

50. Any rule, regulation, order or decision of the Board shall, when published by the Board, or by leave of the Board, for three weeks in the **Canada Gazette**, and while the same remains in force, have the like effect as if enacted in this Act, and all courts shall take judicial notice thereof. R.S., c. 37, s. 31.

Orders of the Board are operative without publication and can be proved under section 68, but publication gives them statutory effect and all courts must then take judicial notice of them without proof. **Underhill v. C.N. Ry. Co.**, 18 C.R.C. 313; 22 D.L.R. 279.

If the words "the like effect as if enacted in this Act" are to be given their full meaning, breach of a published order is a breach of the Act itself, and subject to the same penalties; and sec. 444 is to the same effect; though the Act makes special provision (sec. 34, s.s. 3) for the fixing of penalties by the Board for breach of its regulations and orders.

Baggage regulations prescribed by the Board for the observance of all railway companies published in the **Gazette**, and containing limitations of carriers' liability, held binding upon passengers without proof that these limitations were brought to the passengers' notice: **Sherlock v. G.T.R. Co.**, 47 O.L.R. 473; 48 O.L.R. 237; 54 D.L.R. 524. Affirmed on appeal to Supreme Court of Canada; not yet reported.

Review and Appeal.

Board may
review, etc.

51. The Board may review, rescind, change, alter or vary any order or decision made by it, or may rehear any application before deciding it. 1908, c. 62, s. 8.

An order made on terms by the Board does not estop the applicant from a later application for relief inconsistent with the terms. **St. Thomas v. Michigan Central** 14 C.R.C. 338.

The Board exercised jurisdiction under this section to rescind an order approving location plans of a railway company which had taken no steps during several years to acquire the lands affected; but directed that no order should issue if the company proceeded to expropriate. **McDougall v. C.P.R.**, 9 C.R.C. 201.

The Board, under this section, re-opened a street which it had ordered closed, on account of changed conditions, but on terms. **Victoria v. Esquimalt Ry.**, 9 C.R.C. 470.

The Board will not entertain an application for reconsideration, unless in doubt as to correctness of former decision; or by reason of changed conditions or new material. **American Coal Co. v. M.C.R.**, 21 C.R.C. 15.

The Board having made an order authorising a railway to cross certain streets, pursuant to an agreement with the municipality under which the company undertook to indemnify the municipality against all legal claims by landowners, and finding later that the railway had been constructed across the streets, but the streets had not been closed by by-law and the landowners were therefore without remedy against either the municipality or the railway, varied the order so as to make the right to construct and operate over the streets expressly subject to payment of compensation. **North Bay Landowners v. C.N.O. Ry.**, 23 C.R.C. 35.

52. (1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Board, whether such order or decision is made **inter partes** or otherwise, and whether such regulation is general or limited in its scope and application; and any order which the Governor in Council may make with respect thereto shall be binding upon the Board and upon all parties.

Governor in Council may vary or rescind.

(2) An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, upon leave therefor being obtained from a judge of the said Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from, or within such further time as the judge under special circumstances shall allow,

Appeal to Supreme Court as to jurisdiction by leave of judge.

and upon notice to the parties and the Board, and upon hearing such of them as appear and desire to be heard, and the costs of such application shall be in the discretion of the judge.

This sub-section, in the Act of 1906, was as follows: "An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a Judge of the said Court upon application and upon notice to the parties and the Board and hearing such of them as appear and desire to be heard; and the costs of such application shall be in the discretion of the judge."

Appeal to
Supreme
Court by
leave of
Board.

(3) An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, or a question of jurisdiction, or both, upon leave therefor having been first obtained from the Board within one month after the making of the order or decision sought to be appealed from, or within such further time as the Board under special circumstances shall allow, and after notice to the opposite party stating the grounds of appeal; and the granting of such leave shall be in the discretion of the Board.

This sub-section, in the Act of 1906, was as follows: "An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board; and the granting of such leave shall be in the discretion of the Board."

Entry of
application.

(4) No appeal, after leave therefor has been obtained under sub-section two or three of this section, shall lie unless it is entered in the said Court within sixty days from the making of the order granting leave to appeal.

Security for
costs.

(5) Upon such leave being obtained the party so appealing shall deposit with the Registrar of the Supreme Court of Canada the sum of two hundred and fifty dollars, by way of security for costs, and thereupon the Registrar shall set the appeal down for hearing at the nearest convenient time; and the party appealing shall, within ten days after the appeal has been so set down, give to the parties affected by the appeal, or the respective solicitors

Notice of
appeal.

by whom such parties were represented before the Board, and to the Secretary, notice in writing that the case has been so set down to be heard in appeal as aforesaid; and the said appeal shall be heard by such Court as speedily as practicable.

(6) On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of jurisdiction, or law, as the case may be, and shall certify its opinion to the Board, and the Board shall make an order in accordance with such opinion.

Powers of
the Court.

(7) The Board shall be entitled to be heard by counsel or otherwise, upon the argument of any such appeal.

Board may
be heard.

(8) The Court shall have power to fix the costs and fees to be taxed, allowed and paid upon such appeals, and to make rules of practice respecting appeals under this section; and, until such rules are made, the rules and practice applicable to appeals from the Exchequer Court shall be applicable to appeals under this Act.

Costs.

Practice.

(9) Neither the Board nor any member of the Board shall in any case be liable to any costs by reason or in respect of any appeal or application under this section.

Members of
Board not
liable for
costs.

(10) Save as provided in this section,—

(a) Every decision or order of the Board shall be final; and,

(b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, **certiorari**, or any other process or proceeding in any court.

Proceedings
of Board
final save as
above.

R.S., c. 37, s. 56; 1910, c. 50, s. 1. Am.

The time limitations in sub-sections (2) and (3) are new.

Sub-sec. 4 is taken from c. 50 of 1910, with the substitution of "sixty" for "thirty."

It is to be observed that the limitation in s.s. (2) is as to making the application; that in s.s. (3) is as to actually obtaining the leave. The distinction appears to have been made on account of possible unavoidable delay in getting leave from a Supreme Court Judge, e.g., during vacation.

Appeal by leave of the Board may be on questions of law or jurisdiction or both; appeal by leave of a Judge of the Supreme Court is on questions of jurisdiction only. Thus, within its jurisdiction, the Board is the final arbiter as to facts and law, (see secs. 44 (3) and 52 (6);) unless it chooses, in its discretion, under this section or section 43, to provide for obtaining the opinion of the Supreme Court; or unless the Governor in Council takes action under section 43 or section 52 (1). In the parliamentary committee, the suggestion was made that the question of whether there should be an appeal or not should be left to the Supreme Court as to both law and jurisdiction, but the considerations prevailed that the Chief Commissioner and Assistant Chief Commissioner must be men of long legal experience; that the Board had special knowledge of the matters entrusted to it and that it had in practice given leave in every reasonable case in which it had been applied for.

In the committee, the opinion was expressed that if the Board refused leave to appeal on a question of jurisdiction, application might afterwards be made to a Judge of the Supreme Court. Under the former Act, doubt as to whether the questions involved were to be regarded as questions of law or questions of jurisdiction led in some cases to two applications being made, one to the Board and the other to a Judge, to ensure that the appeal should be properly before the Supreme Court.

Notwithstanding sub-sec. 10, there remains in addition to the appeals provided for in this section, the right of appeal to the Privy Council by leave granted by it in the exercise of the King's prerogative. **Toronto Ry. Co. v. City of Toronto**; [1920] A.C. 426; 25 C.R.C. 318.

See note on Appeals from Board, 25 C.R.C. 335.

In the English Act the Crown is expressly mentioned, see section 17, sub-section 6. The usual rule is that the King is not bound by any statute, if he be not expressly named so as to be bound. Broom's Legal Maxims, 7th Edition, pp. 56 *et seq.*

See note "Review of orders of Board," 4 C.R.C. 396.

No appeal lies from an order of a judge of the Supreme Court in Chambers refusing leave to appeal under sub-section 2 of this section; **Williams v. G.T.R.**, 4 C.R.C. 302; see also note 4 C.R.C. 396.

Where the Board having jurisdiction to impose terms imposed them on evidence alleged to be insufficient, it was held on appeal to the Supreme Court that the ques-

tion was rather one of law than of jurisdiction, and the appeal should have been taken on leave of the Board under sub-section 3 and not on leave of a judge under sub-section 2, or should have been brought before the Governor in Council under sub-section 1. **James Bay Ry Co. v. G.T.R.**, 37 S.C.R. 372; 5 C.R.C. 164.

Sec. 4 apparently was passed in consequence of the decision in **G.T.R. v. Dept. of Agriculture**, 42 S.C.R. 557, 10 C.R.C. 84.

An order made on terms by the Board does not estop the applicant from making a later application for relief inconsistent with the terms. **St. Thomas v. Michigan Central Ry.**, 14 C.R.C. 338.

A Court of Appeal will not strike out of an order of a Railway Board a part of it which is without jurisdiction and leave the remainder, where the effect would be to make a different order from that which the Board intended. **Re City of Toronto and Toronto Ry. Co.**, 14 C.R.C. 422; 26 O.L.R. 225.

"An appeal from an order of the Board lies to the Supreme Court under section 56, sub-sec. 2 of the Railway Act, 1906, after the leave prescribed by that section has been obtained, on any question of jurisdiction or law. Under sub-sec. 3, the Supreme Court is to determine by its judgment the questions submitted, and under sub-sec. 5 to certify its opinion to the Board, which is to make an order in accordance therewith; and that order by sub-sec. 9 is declared to be final." **C.P.R. Co. v. City of Toronto**, 12 C.R.C. 378; [1911] A.C. 461.

Leave will not be given under sub-sec. 2, where the Judge applied to has no doubt that the Board's decision on a question of jurisdiction is correct. **Halifax v. G.T.R.**, 12 C.R.C. 58.

Nor will an appeal under sub-sec. 3 be entertained unless the Board, in its order granting leave sets out one or more specific questions which in its opinion are questions of law (or jurisdiction) and as to which the leave to appeal is given. **C.P.R. v. Regina Board of Trade**, 12 C.R.C. 369; 44 S.C.R. 328; 45 S.C.R., pp. 323 to 328; **C.P.R. v. Ottawa**, 48 S.C.R. 257.

The sixty-day limitation imposed by section 69 of the Supreme Court Act does not apply to appeals under this section. **G.T. Ry. Co. v. Dept. of Agriculture**, 10 C.R.C. 84. But see, now, the time limitations in sub-secs. 2, 3 and 4.

Practice and Procedure.

Rules of
practice and
procedure.

53. The Board may make general rules regulating, so far as not inconsistent with the express provisions of this Act, its practice and procedure. R.S., c. 37, s. 51.

General rules have been promulgated from time to time.

Notice and Service.

Notices, how
signed,—

By Board;

54. Any notice required or authorised to be given in writing,—

(a) by the Board, may be signed by the Secretary or Chief Commissioner;

See secs. 10 (5), 11 (2), and 11 (4).

By Minister
and others;

(b) by the Minister, inspecting engineer, or other officer or person appointed by the Minister, or the Board, may be signed by the Minister, or by such inspecting engineer, officer or other person, as the case may be;

By company
or corpora-
tion.

(c) by any company or corporation, may be signed by the president or secretary, or mayor, warden, reeve or other principal officer thereof, or by its duly authorised agent or solicitor;

The words "or mayor, warden, reeve or other principal officer thereof" are new.

By any
person.

and (d) by any person, may be signed by such person or his duly authorised agent or solicitor. R.S., c. 37, s. 40. Am.

Mode of
service.

55. (1) Service of any notice, summons, regulation, order, direction, decision, report or other document, unless in any case otherwise provided, may be effected,—

On compan-
ies required
to name
agent.

(a) upon a railway, telegraph, telephone, or express company to which this Act in whole or in part applies, by delivering the document or a copy thereof to the person entered by the company as its agent in the agents' book in sub-section two of this section provided for; or, at his residence, to any member of his household; or, at the place of business or other place entered in the agents' book, to any clerk or adult person in his employ; or if at

the time of attendance to serve any document the place of business or other place aforesaid is closed or no one is in attendance therein for receiving service, service of the document may be effectively made by mailing the same or a copy thereof at any time during the same day or the next following day by registered letter, postage prepaid, addressed to the agent at such place of business or other place, and the service shall be deemed to have been effected at the time of attendance for service; or, if the company has not caused the required entry to be made in the agents' book, then posting up the document or a copy thereof in the office of the Secretary of the Board shall be effective service upon the company, unless the Board otherwise orders; but the Board may in any case direct that the fact of service upon an agent and the nature of the document served shall be communicated to the company by telegraph, or may make any other order or direction it deems proper as to such service;

This sub-section is a recasting, without important changes, of c. 62, sec. 10 of 1908, and c. 22, sec. 3 of 1911. A copy may now be mailed instead of the document itself. The "next following day" is now allowed for mailing. The last clause ("or may make, etc.") is new.

- (b) upon any railway company, whether included in paragraph (a) or not, by delivering the document or a copy thereof to the president, a vice-president, or a managing director, or the secretary or superintendent of the company; or, at the head or any principal office of the company, to some adult person in its employ;

Railway
companies.

Substantially the same as 1906, c. 37, sec. 41 (a).

- (c) upon any company other than a railway company, whether such company is included in paragraph (a) or not, by delivering the document or a copy thereof to the president, a vice-president, or the manager or secretary of the company; or, at

Other
companies.

its head office, to some adult person in its employ;

Substantially 1906, c. 37, sec. 41 (c).

Municipal-
ities.

(d) upon a municipality or civic or municipal corporation, by delivering the document or a copy thereof to the mayor, warden, reeve, secretary, treasurer, clerk, chamberlain or other principal officer thereof;

Substantially the same as 1906, c. 37, sec. 41 (b).

Co-
partnerships.

(e) upon a firm or co-partnership, by delivering the document or a copy thereof to any member of such firm or co-partnership; or, at the last place of abode of any such member, to any adult member of his household; or, at the office or place of business of the firm, to a clerk employed therein;

Substantially the same as 1906, c. 37, sec. 41 (d).

Individuals.

(f) upon an individual, by delivering the document or a copy thereof to him; or, at his last place of abode, to any adult member of his household; or, at his office or place of business, to a clerk in his employ;

Substantially the same as 1906, c. 37, sec. 41 (e).

Order for
service by
publication.

Provided that if, in any case within the jurisdiction of the Minister, or the Board, it is made to appear to the satisfaction of the Minister, or the Board, as the case may be, that service cannot conveniently be made in the manner above provided, the Minister, or the Board, as the case may be, may order and allow service to be made by publication of the document or notice thereof for any period not less than three weeks in the **Canada Gazette**, and also, if so ordered, in any other newspaper; and such publication shall be deemed to be equivalent to service in the manner above provided.

Substantially the same as 1906, c. 37, sec. 41 (2). The words "or notice thereof" are new, and will make the publication, verbatim, of long documents unnecessary in many cases.

Agents'
book.

(2) There shall be kept in the office of the Secretary of the Board a book to be called the agents' book in

which every railway, telegraph, telephone, and express company to which this Act in whole or in part applies shall enter its name and the place of its head office and the name of an agent at Ottawa and his place of business or some other proper place within Ottawa where he may be served for such company. R.S., c. 37, s. 41; 1908, c. 62, s. 10; 1911, c. 22, s. 3. Am.

Sub-sec. (2) was first enacted in 1908; the words "telegraph, telephone or express" were added in 1911.

56. Every company shall, as soon as possible after receiving or being served with any regulation, order, direction, decision, notice, report or other document of the Minister, or the Board, or the inspecting engineer, notify the same to each of its officers and servants performing duties which are or may be affected thereby, by delivering a copy to him or by posting up a copy in some place where his work or his duties, or some of them, are to be performed. R.S., c. 37, s. 42.

Duty of
company
upon being
served.

57. Unless otherwise provided, fifteen days' notice of any application to the Board, or of any hearing by the Board, shall be sufficient: Provided that the Board may in any case direct longer notice or allow notice for any period less than fifteen days. R.S., c. 37, s. 43. Am.

Notice of
application.

The corresponding section in the Act of 1906 had "ten days" in both places, instead of "fifteen days." The longer period had been usual in practice before the amendment.

58. (1) Notice of any application to the Board for permission as provided by the **Lord's Day Act**, to perform any work on the Lord's Day in connection with the freight traffic of any railway, shall be given to the Department of Railways and Canals, and shall fully set out the reasons relied upon.

Notice of
application
for
permission
to work on
Sunday.
R.S., c. 153.

(2) The costs of any such application shall be borne by the applicant, and, if more than one, in such proportions as the Board determines.

Costs.

(3) In all other respects the procedure provided by this Act, shall, so far as applicable, apply to any such application. R.S., c. 37, s. 44.

Procedure
in other
respects.

As to the jurisdiction of the Board with regard to Sunday work, see **Re Lord's Day Act and C.P.R.**, 11 C.R.C. 193.

Ex parte.

59. (1) Except as herein otherwise provided, when the Board is authorised to hear an application, complaint or dispute, or make any order, upon notice to the parties interested, it may, upon the ground of urgency, or for other reason appearing to the Board to be sufficient, notwithstanding any want of or insufficiency in such notice, make the like order or decision in the matter as if due notice had been given to all parties; and such order or decision shall be as valid and take effect in all respects as if made on due notice.

"Except as herein otherwise provided" is new. See sec. 41 and notes thereon.

Rehearing.

(2) Any company or person entitled to notice and not sufficiently notified may, at any time within ten days after becoming aware of such order or decision, or within such further time as the Board may allow, apply to the Board to vary, amend or rescind such order or decision, and the Board shall thereupon, on such notice to other parties interested as it may in its discretion think desirable, hear such application, and either amend, alter or rescind such order or decision, or dismiss the application, as may seem to it just and right. R.S., c. 37, s. 45. Am.

The words "company or" are new.

See sec. 51, as to power of the Board to review, rescind and vary its orders and decisions.

Amending Proceedings.

**Amend-
ments.**

60. The Board may, upon terms or otherwise, make or allow any amendments in any proceedings before it. R.S., c. 37, s. 52.

Costs.

Costs.

61. (1) The costs of and incidental to any proceeding before the Board, except as herein otherwise provided, shall be in the discretion of the Board, and may be fixed in any case at a sum certain, or may be taxed.

Costs of an application under sec. 8 must be paid by the applicant.

(2) The Board may order by whom and to whom any costs are to be paid, and by whom the same are to be taxed and allowed. Payment.

(3) The Board may prescribe a scale under which such costs shall be taxed. *R.S., c. 37, s. 58.* Scale.

For definition of costs, see sec. 2 (5).

The Board, as a general policy, does not award costs of proceedings before it, though under this section it has power to do so. *Currie v. C.P.R.*, 13 C.R.C. 31; *C.P.R. v. Walkerton*, 15 C.R.C. 85.

Costs of proceedings before the Board may be allowed by a referee, under a submission giving him power over costs, notwithstanding the Board's rule not to give costs. *C.P.R. v. Walkerton, supra.*

Witnesses and Evidence.

62. (1) The Board may order that any witness resident or present in Canada may be examined upon oath before, or make production of books, papers, documents or articles to, any one member of the Board, or before or to any officer of the Board, or before or to any other person named for the purpose by the order of the Board, and may make such orders as seem to it proper for securing the attendance of such witness and his examination, and the production by him of books, papers, documents, or articles, and the use of the evidence so obtained, and otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof: Provided that no person shall be compellable, against his will, to attend for such examination or production at any place outside the province in which he is served with the order of the Board for the purpose. Powers regarding witnesses and evidence.

(2) The Board may issue commissions to take evidence in a foreign country, and make all proper orders for the purpose, and for the return and use of the evidence so obtained. *R.S., c. 37, s. 63.* Commissions to take evidence in foreign countries.

63. (1) The Board may accept evidence upon affidavit or written affirmation, in cases in which it seems to it proper to do so. Evidence by affidavit.

Who may
administer
oaths in
Canada.

(2) All persons authorised to administer oaths to be used in any of the superior courts of any province may administer oaths in such province to be used in applications, matters or proceedings before the Board.

Commission-
ers for
Supreme and
Exchequer
Courts.

(3) All persons authorised by the Governor in Council to administer oaths within or out of Canada, in or concerning any proceeding had or to be had in the Supreme Court of Canada or in the Exchequer Court of Canada, may administer oaths in or concerning any application, matter, or proceeding before the Board.

Oaths
outside
Canada.

(4) An oath administered out of Canada, before any commissioner authorised to take affidavits to be used in His Majesty's High Court of Justice in England, or before any notary public, certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony or possession of His Majesty out of Canada, or in any foreign country, and certified under the common seal of such city, borough, or town corporate, or before a judge of any court of supreme jurisdiction in any colony or possession of His Majesty, or dependency of the Crown out of Canada, or before any consul, vice-consul, acting-consul, pro-consul or consular agent of His Majesty, exercising his functions in any foreign place, certified under his official seal, concerning any application, matter or proceeding had or to be had by or before the Board, shall be as valid and of like effect, to all intents, as if it had been administered before a person authorised by the Governor in Council as in this section provided.

Documents
in testimony
of adminis-
tration of
oaths.

(5) Every document purporting to have affixed, imprinted or subscribed thereon or thereto, the signature of any such person or commissioner so authorised as afore-said, or the signature or official seal of any such notary public, or the signature of any such mayor or chief magistrate and the common seal of the corporation, or the signature and official seal of any such consul, vice-consul, acting-consul, pro-consul or consular agent, in testimony of any oath having been administered by or before him, shall be admitted in evidence before the Board without proof of any such signature or seal being the signature or seal of the person or corporation whose signature or seal

it purports to be, or of the official character of such person.

(6) No informality in the heading or other formal requisites of any oath made before any person under any provision of this section shall be an objection to its reception in evidence before the Board, if the Board thinks proper to receive it; and if it is actually sworn to by the person making it before any person duly authorised thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury. R.S., c. 37, s. 64.

Informalities
shall not
invalidate.

64. Every person summoned to attend before the Minister or the Board, or before any inspecting engineer, or person appointed under this Act to make inquiry and report shall, in the discretion of the Minister or the Board, receive the like fees and allowances for so doing as if summoned to attend before the Exchequer Court. R.S., c. 37, s. 65.

Fees and
allowances.

65. No person shall be excused from attending and producing books, papers, tariffs, contracts, agreements and documents, in obedience to the subpoena or order of the Board, or of any person authorised to hold any investigation or inquiry under this Act, or in any cause or proceeding based upon or arising out of any alleged violation of this Act, on the ground that the documentary evidence required of him may tend to criminate him or subject him to any proceeding or penalty; but no such book, paper, tariffs, contract, agreement or document so produced shall be used or receivable against such person in any criminal proceeding thereafter instituted against him, other than a prosecution for perjury in giving evidence upon such investigation or inquiry, cause or proceeding. R.S., c. 37, s. 66.

No person to
be excused
from
producing.

66. In any proceeding before the Board and in any action or proceeding under this Act, every written or printed document purporting to have been issued or authorised by the company, or any officer, agent, or employee of the company, or any other person or company for or on its behalf, shall, as against the company, be received as **prima facie** evidence of the issue of such document by the

Documents
issued by
the company.

company and of the contents thereof, without any further proof than the mere production of such document. R.S., c. 37, s. 67.

Documents
issued by
Minister,
Board or
engineer.

67. (1) Every document purporting to be signed by the Minister, or by the Chief Commissioner and Secretary or either of them, or by an inspecting engineer, shall, without proof of any such signature, be **prima facie** evidence that such document was duly signed and issued by the Minister, the Board, or inspecting engineer, as the case may be.

Copies.

(2) If such document purports to be a copy of any regulation, order, direction, decision or report made or given by the Minister, the Board, or an inspecting engineer, it shall be **prima facie** evidence of such regulation, order, direction, decision or report. R.S., c. 37, s. 68.

This section does not cover signatures by the Assistant Chief Commissioner, the Deputy Chief Commissioner or other Commissioner under sec. 11; or of an acting Secretary under sec. 24.

Documents
certified by
Secretary.

68. (1) Any document purporting to be certified by the Secretary as being a copy of any plan, profile, book of reference or other document deposited with the Board, or of any portion thereof, shall, without proof of the signature of the Secretary, be **prima facie** evidence of such original document, and that the same is so deposited, and is signed, certified, attested or executed by the persons by whom and in the manner in which, the same purports to be signed, certified, attested or executed, as shown or appearing from such certified copy; and also, if such certificate states the time when such original was so deposited, that the same was deposited at the time so stated.

Documents
in custody
of the Board.

(2) A copy of any regulation, order or other document in the custody of the Secretary or of record with the Board, certified by the Secretary to be a true copy, and sealed with the seal of the Board, shall be **prima facie** evidence of such regulation, order or document, without proof of signature of the Secretary.

Certificate
that no
order or
regulation
made.

(3) A certificate purporting to be signed by the Secretary, sealed with the seal of the Board, shall be **prima facie** evidence of the facts therein stated without proof

of the signature of the Secretary. R.S., c. 37, s. 69. Am.

Sub-sec. (3) is new. The section makes no reference to certificates by an Acting Secretary, under sec. 24.

Orders of the Board are operative without publication and may be proved under this section. **Underhill v. C.N. Ry. Co.**, 18 C.R.C. 313; 22 D.L.R. 279 .

Inquiries.

69. (1) The Board may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Board, or upon any matter or thing over which the Board has jurisdiction under this or the Special Act. Board may order.

(2) The Minister may, with the approval of the Governor in Council, appoint and direct any person to inquire into and report upon any matter or thing which the Minister is authorised to deal with under this Act or the Special Act. R.S., c. 37, s. 60. Minister may order inquiry.

“Minister” means the Minister of Railways and Canals. Sec. 2 (17).

An order was made under this section referring long and intricate disputed accounts to a Supreme Court registrar to take the accounts and report; the reference at the applicant's risk as to costs. **City of Vancouver v. V. V. and E. Ry.**, 23 C.R.C. 123.

70. The Minister, the Board, or the inspecting engineer, or person appointed under this Act to make any inquiry or report may,— Powers.

(a) enter upon and inspect any place, building, or works, being the property or under the control of any company, the entry or inspection of which appears to it or him requisite; Entry.

(b) inspect any works, structure, rolling stock or property of the company; Inspection.

(c) require the attendance of all such persons as it or he thinks fit to summon and examine, and require answers or returns to such inquiries as it or he thinks fit to make; Attendance and returns.

(d) require the production of all material books, papers, plans, specifications, drawings and documents; and. Production.

Oaths.

Generally.

(e) administer oaths, affirmations or declarations; and shall have the like power in summoning witnesses and enforcing their attendance, and compelling them to give evidence and produce books, papers or things which they are required to produce, as is vested in any court in civil cases. R.S., c. 37, s. 61.

"Minister" means the Minister of Railways and Canals. Sec. 2 (17).

As to "inspecting engineer," see secs. 2 (12), 71, 276, 283, 284, 393, 411.

Inspecting Engineers.

Appointment
of inspecting
engineers.

71. (1) Inspecting engineers may be appointed by the Minister or the Board, subject to the approval of the Governor in Council.

Duties.

(2) It shall be the duty of every such inspecting engineer, upon being directed by the Minister or the Board, as the case may be, to inspect any railway, or any branch line, siding, or portion thereof, whether constructed, or in the course of construction, to examine the stations, rolling stock, rails, roadbed, right of way, tracks, bridges, tunnels, trestles, viaducts, drainage, culverts, railway crossings and junctions, highway and farm crossings, fences, gates, and cattle-guards, telegraph, telephone or other lines of electricity, and all other buildings, works, structures, equipment, apparatus, and appliances thereon, or to be constructed or used thereon, or such part thereof as the Minister, or the Board, as the case may be, may direct, and forthwith to report fully thereon in writing to the Minister or the Board, as the case may be.

Powers of
inspecting
engineer.

(3) Every such inspecting engineer shall have the same powers with regard to any such inspection as are by this Act conferred upon a person appointed by the Board to make an inquiry and report upon any matter pending before the Board.

Duties of
company
respecting
inspecting
engineers.

(4) Every company, and the officers and directors thereof, shall afford to any inspecting engineer such information as is within their knowledge and power, in all matters inquired into by him, and shall submit to such inspecting engineer all plans, specifications, drawings and documents relating to the construction, repair, or

state of repair of the railway, or any portion thereof.

(5) Every such inspecting engineer shall have the right, while engaged in the business of such inspection, to travel without charge on any of the ordinary passenger trains running on the railway, and to use without charge the telegraph wires and machinery in the offices or under the control of any such company.

Inspecting
engineers
may travel
free.

Use
telegraph
wires.

(6) The operators, or officers, employed in the telegraph offices or under the control of the company, shall, without unnecessary delay, obey all orders of any such inspecting engineer for transmitting messages.

Transmission
of telegrams.

(7) The production of his appointment in writing, signed by the Minister, the Chief Commissioner, or the Secretary, shall be sufficient evidence of the authority of such inspecting engineer. R.S., c. 37, s. 260.

Proof of
engineer's
authority.

For definition of "inspecting engineer," see sec. 2 (12).

For penalty for refusing to obey or obstructing inspecting engineer, see secs. 393 and 411.

Chapter 66, (1920) section 71A, gave the Board certain powers with respect to coal and other fuel supplies in case of scarcity until the last day of the next succeeding session of Parliament and no longer.

Railway Companies.

Incorporation.

72. Every railway company incorporated under a Special Act shall be a body corporate, under the name declared therein, and shall be vested with all such powers, privileges and immunities as are necessary to carry into effect the intention and objects of this Act, and of the Special Act, and which are incident to such corporation, or are expressed or included in the **Interpretation Act**. R. S., c. 37, s. 79.

General
powers.

R.S., c. 1.

The word "railway" is new.

The following provisions of the Interpretation Act, R.S.C., 1906, cap. 1, are more particularly applicable to corporations:

Sec. 34, sub-sec. (20). The word "person" includes any body corporate and politic.

Sec. 30. Words creating any association or number of persons into a corporation or body politic and corporate shall vest in them power to sue and be sued, contract and be contracted with by their corporate name, to have a common seal and to alter the same at their pleasure, to have perpetual succession and power to acquire and hold personal property or moveables for the purposes for which the corporation is constituted, and to alienate the same and shall also vest in the majority of the members the power to bind the others by their acts and shall exempt the individual members of the corporation from personal liability for its debts, obligations or acts provided they do not violate the provisions of the act incorporating them. But no corporation shall carry on the business of banking unless when such powers are expressly conferred upon them by the act creating such corporation. With this section may be compared Blackstone's enumeration of the ordinary capacities and incidents of corporations quoted in Brice on *Ultra Vires*, 3rd Ed., p. 3.

Sec. 20. Whenever any Act or enactment is repealed, and other provisions are substituted by way of amendment, revision or consolidation,—

(a) all regulations, orders, ordinances, rules, and by-laws made under the repealed Act or enactment, shall continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead; and,

(b) any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment; and, if there is no provision in the substituted Act or enactment relating to the same subject-matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed in so far, and in so far only, as is necessary to support, maintain or give effect to such repealed Act, or such rule, order or regulation made thereunder.

In the case of a company which was not a railway company but which had had incorporated into its Special Act (2 Edw. VII., cap. 107, D.), certain provisions of the Railway Act in force at the time of the passing of the Special Act it was held that by virtue of the provisions of this subsection, the corresponding provisions of any revision of

the Railway Act were incorporated in the Special Act, and that when the Railway Act was changed corresponding changes were made in the Special Act: **Lees v. Toronto and Niagara Power Co.** (1906), 6 C.R.C. 128.

See also **Northern Counties, etc., Co. v. C.P.R.**, 13 B.C. R. 130; 7 C.R.C. 164.

Name of Corporation. In Manitoba it has been held that a misnomer or variation from the true name of a corporation in any grant or obligation by or to it is not material if the identity of the corporation is unmistakable: **McRae v. Corbett**, 6 Man. L.R. 426. And if the opposite party in an action desires to set up misnomer he must object by application in chambers to compel the company to amend and cannot set it up as ground for a non-suit: **G.N. W. Tel. Co. v. McLaren**, 1 Man. L.R. 358, and see **Watrous v. McLean**, 2 Man. L.R. 279. In England the Courts have restrained the use by one company of the name granted by its Letters Patent when it has been convinced that that name was used for the purpose of unfair competition with another which had already built up a connection in the same line of business under a similar name: **North Cheshire, etc., Co. v. Manchester Brewery Co.** (1898), 1 Ch. 539 (1899), A.C. 83; **Randall v. The British and American Shoe Co.** (1902), 2 Ch. 354; **Montreal Lithographing Co. v. Sabiston**, Q.R. 6, Q.B. 510, (1899), A.C. 610.

Joint Stock Company. A railway company incorporated by Special Act will come sufficiently within the definition Joint Stock Company, which term may be used interchangeably with "corporation" and "company." The designation joint stock being used to distinguish such companies from private partnerships and corporations which have no stock or shares, such as syndicates, ecclesiastical bodies, trustees, etc.: **Hamilton v. Stewiacke, etc., R.W. Co.**, 30 N.S.R. 10, at p. 13.

For general powers under this Act see secs. 162 to 165.

For powers of taking and using lands and limitations thereon, see secs. 189 to 243.

For powers to build branch lines see secs. 180-187.

For rules governing expiry and lapse of charter powers, see notes to sec. 161.

Powers of Railway Companies. The leading principles on the subject of powers of companies generally are set out in cap. 5 of Brice on **Ultra Vires**, 3rd Ed., pp. 60 and 61; quoted Masten on Company Law, p. 89.

As a general rule a company unless specially incorporated for that purpose cannot engage in business as a

railway company: **Ashbury Carriage Company v. Riche**, L.R. 9 Ex. 224, 249, L.R. 7 H.L. 653.

And the incorporation of sections corresponding to secs. 180 **et seq.** in a Bridge Company's Charter, held not to give power to construct a spur line, when company not otherwise empowered to build a railway. **International Bridge Co. v. C.N. Ry. Co.**, 21 C.R.C. 218.

The following remarks of Lord Cairns in the *Ashbury Carriage* case in the House of Lords, at p. 667, explain the reason for this rule. "Your Lordships are well aware that this is the Act (Joint Stock Companies Act of 1862) which put upon its present permanent footing the regulation of joint stock companies and more especially of those joint stock companies which were to be authorised to trade with a limit to their liability. The provisions under which that system of limiting liability was inaugurated were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being of the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind." It was therefore held in that case that even though a company was empowered to build railway cars and other rolling stock and carry on business as "general contractors" it had no power to build a railway.

In **Charlebois v. Delap**, 26 S.C.R. 221, the same principle is laid down as follows: "A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter or such as are reasonably incidental thereto; nor to exercise their powers in the attainment of authorised objects in a manner not authorised by the charter." Affirmed as to this, (1899), A.C. 114. This case decided that a company had no power to enter into a contract with one of its directors for the purchase of shares and for the payment of a bonus to him, that such contract was invalid as being beyond the powers of the company even though authorised and approved of by every shareholder, that it was equally impossible to ratify such a contract after it was made and that a judgment obtained by consent based upon this contract cannot stand where the question of **ultra vires** was not litigated and the point was not presented to the court. For this see report of the above case (1899), A.C., at p. 124, as

follows: "It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the Act is one of the points substantially in dispute that may be a fair subject of compromise in court like any other disputed matter; but in this case both the parties, plaintiff and defendant in the original action and in the cross action, were equally insisting on the contract * * * Such a judgment cannot be of more validity than the invalid contract on which it was founded." These principles govern equally whether the company is acting under a Special Act of Parliament or under Letters Patent granted by the Crown: **Attorney-General v. Great Eastern Ry. Co.**, 5 A. C., p. 473.

Acts Ultra Vires in England. It has been held that the railway company may not apply its funds to promote a bill in Parliament for extended powers: **East Anglian Ry. Co. v. Eastern Counties Ry. Co.**, 11 C.B. 775. And see cases cited Browne and Theobald, 4th Ed., p. 92. Nor can it expend its funds in prosecuting a suit instituted by a shareholder on behalf of himself and all other shareholders against the company and its directors to make the latter liable for improper dealings with the company's property: **Kernaghan v. Williams**, 6 Eq. 228; **Studdert v. Grosvenor**, 33 Ch. D., 528; and litigation between different members of the company cannot be paid for by the company: **Pickering v. Stephenson**, 14 Eq. 322; **Smith v. Manchester**, 24 Ch. D. 611. Funds raised for constructing new lines may not be applied upon the original line: **Bagshaw v. Eastern Union Ry. Co.**, 2 McN. & G. 389. Nor can a company authorised to build a line between two termini and having to raise money for that purpose abandon a portion of the line and apply the money for other purposes: **Cohen v. Wilkinson**, 12 Beav. 138, 1 McN. & G. 481; **Graham v. Birkenhead, etc., Ry. Co.**, 12 Beav. 460.

Nor may a company purchase the shares of another company: **Salomons v. Laing**, 12 Beav. 339.

Nor may it work coal mines or deal in coal for the purpose of profit: **Attorney-General v. Great Northern Ry. Co.**, 8 W.R. 556; although past workings of coal may be impliedly legalised by Act of Parliament: **Ecclesiastical Commrs. v. North Eastern Ry. Co.**, 4 Ch. D. 845.

Subscriptions to public or charitable organizations have been held **ultra vires**, even though the organization

might increase passenger traffic: **Tomkinson v. South Eastern Ry. Co.**, 35 Ch. D. 675.

Nor may a railroad company not expressly authorised purchase steam boats for the purpose of carrying passengers to another railway: See **Colman v. Eastern Counties Ry. Co.**, 10 Beav. 1; although the contrary was held in **South Wales Ry. Co. v. Redmond**, 10 C.B.N.S. 675. See this discussed in Brice on **Ultra Vires**, 3rd Ed., p. 127, note 1. In the absence of special legislative sanction to the contrary dividends must be paid in money, not in shares: **Hoole v. G. W. Ry. Co.**, L.R. 3 Ch. 262, followed by **Wood v. Odessa Co.**, 42 Ch. D. 636; although the contrary is the rule in the United States: Brice, p. 347. The funds of the company may not be employed in buying up opposition to a bill: **Scottish, etc., Ry. Co. v. Stewart**, 3 Macq. 382. The following acts have been held in England to be within the powers of railway companies: Providing funds to oppose a dangerous bill: **Attorney-General v. Andrews**, 2 MacQ. & G., 225; **Attorney-General v. Mayor of Brecon**, 10 Ch. D. 204. Laying down a narrow gauge as well as a broad gauge line of rails: **Beman v. Rufford**, 15 Jur. 914. A railway company bound to supply ferry boats may employ these boats in excursions to places not mentioned in its acts when not wanted for the ferry: **Forest v. Manchester, etc., Ry. Co.**, 30 Beav. 40.

A railway company is often by its charter given subsidiary powers such as operating a telegraph or telephone system, running steamboats, etc. But where these powers are subsidiary to the main object, it has been held that if the main object fails the subsidiary powers go with it. If the railway cannot be built then the telephone system cannot be operated, etc. In **Re German Date Coffee Co.**, 20 Ch. D. 169; **Stephens v. Mysore** (1902), 1 Ch. 745; **Pedlar v. Road Block Gold Mines** (1905), 2 Ch. 427.

A company possessing rolling stock not required for its immediate purposes may let the same to other companies: **Attorney-General v. Great Eastern Ry. Co.**, 11 Ch. D. 449, 5 A.C. 473, and so one company may agree to supply another company tributary to it with such rolling stock as it may require even though this may involve the manufacture of rolling stock by the former company in excess of its own wants: **Attorney-General v. Great Eastern Ry. Co.**, *supra*. And so a company may give gratuities to its servants or directors: **Hutton v. West Cork Ry. Co.**, 23 Ch. D. 654. But a resolution by directors that a co-director who was paid should in addition

receive travelling and hotel expenses is invalid. **Young v. Naval, etc., Society** (1905), 1 K.B. 687.

And although it may be forbidden by Act of Parliament to grant a preference to one customer over another, yet the act is not *ultra vires* and cannot be restrained in an action brought by the shareholder against the company on the ground that it is acting beyond its powers: **Anderson v. Midland Ry. Co.** (1902), 1 Ch. 369.

In an important municipal case in England, **London County Council v. Attorney-General and others** (1901), 1 Ch. 781, (1902), A.C. 165, it was held that where a county council had power to purchase and work tramways this would not empower it to run omnibuses in connection therewith, the omnibus business not being incidental to the tramway business. Affirmed in **Attorney-General v. Mersey** (1907), A.C. 415, reversing a decision of the Court of Appeal, 1907, 1 Ch. 81. In this case the House of Lords held that as the omnibus business was not incidental to or consequential on the statutory powers of a railway, the railway would be restrained from operating an omnibus line.

See also Halsbury, Vol. 5, pp. 283 to 288.

Acts Ultra Vires in Canada. One railway company without express statutory authority has no power to agree to build the line of another railway: **G. W. Ry. Co. v. Preston, etc., Ry. Co.**, 17 U.C.R. 477. Nor can one railway grant running rights over its line to another after the time for completing its undertaking has expired: **The Carlton, etc., Ry. Co. v. Grand Southern Ry. Co.** (N.B.), 2 Can. L.T. 406, 21 N.B.R. 339. And it also seems from this case that though one railway might grant to another a right to connect with it and have a running power over it, it would have no power to grant to another a right to construct a separate track alongside its own.

A Bridge Company empowered to build a bridge and charge tolls to any railway desiring to use it has no right to grant exclusive privileges to one railway: **Attorney-General v. Niagara Falls Bridge Company**, 20 Gr. 34. And a contract to pay one of the directors a bonus upon the purchase of stock by him is *ultra vires*: **Charlebois v. Delap**, 26 S.C.R. 221 (1899), A.C. 114.

A railway company cannot grant an easement across railway lands even by resolution or deed: **Canada Southern Ry. Co. v. Niagara Falls**, 22 O.R. 41. Nor, as a rule, can any one acquire an easement over such lands by prescription: **Guthrie v. C.P.R.**, 1 C.R.C., pp. 1 and 9. But

see, now, sec. 222 and notes thereon, post. Nor can a railway company without express statutory authority sell lands acquired by it for the purposes of the railway: **Pratt v. G.T.R.**, 8 O.R. 499; and see also **Mulliner v. Midland Ry. Co.**, 11 Ch. D. 611, following **Bostock v. N. Staffordshire Ry. Co.**, 4 E. & B., 798.

Yet lands of a railway company which are necessary or may become necessary, for railway purposes may be acquired against it by adverse possession: **Midland Ry. Co. v. Wright** (1901), 1 Ch. 738.

And a railway company can contract to give a farm crossing: **McKenzie v. G.T. Ry. Co.**; **Dickie v. G.T. Ry. Co.**, 7 C.R.C. 47.

Where a railway company had given a bond to secure payment of compensation for lands expropriated pursuant to provincial statute and had afterwards been declared to be a work for the general advantage of Canada it was held that it had no power to enter into such bond or continue its obligation thereunder and must pay money into court pursuant to the Dominion Railway Act: **Nihan v. St. Catharines, etc., Ry. Co.**, 16 O.R. 459.

A railway company which has constructed its line between the termini mentioned in the statute may not thereafter build beyond it without obtaining legislative authority: **Kingston & Pembroke Ry. Co. v. Murphy**, 11 O.R. 302, 582, 17 S.C.R. 582. And see sec. 183, sub-sec. 2 (b).

Acts Intra Vires in Canada. The following acts have been held to be *intra vires* of railway companies in Canada. To mortgage its lands even though the mortgage is wider than the terms of its statutory authority: **Bickford v. Grand Junction Ry. Co.**, 1 S.C.R. 696; **Charlebois v. Great North West Central Ry. Co.**, 9 Man. L.R. 1. And see further as to this, and as to power to sign notes and bills, the Notes to sections 132 to 145, *infra*.

The Canadian Pacific Railway Company may, under its act of incorporation, 44 Vic., cap. 1 (D.), build beyond the terminus mentioned in that statute: **Edmonds v. C.P. Ry. Co.**, 1 B.C.R., Pt. II., 272, 295; **Major v. C.P.R.**, *Ibid.*, 287, and **C.P.R. v. Major**, 13 S.C.R. 233, and may build branch lines from any point on the main line. **Re Branch Lines, C.P. Ry. Co.**, 36 S.C.R. 42. Compare with this **Kingston & Pembroke Ry. Co. v. Murphy**, *supra*. It has been also held that that railway and probably all railways authorised to do business by the Dominion of Canada in any province of the Dominion may hold lands in that pro-

vince without obtaining a license from the local Government: **Re C.P.R. Co.**, 7 Man. L.R. 389. A railway company may also enter into agreements in the nature of Joint Traffic Agreements with other railways or carrying companies even in the absence of express statutory authority: **C.P.R. Co. v. Owen Sound Steamship Co.**, 17 O.R. 691, 17 A.R. 482; and the fact that such agreements may be in fact a pledge of part of its earnings to another company will not vitiate the transaction: s.c. The Canada Southern Ry. Co. had power under its statutes and possibly under the general law to lease its line to another railway company even though the latter was incorporated in a foreign country: **Wealleans v. Canada Southern Ry. Co.**, 21 A.R. 297, and **Michigan Central Ry. Co. v. Wealleans**, 24 S.C.R. 309. But without express statutory authority a railway company cannot lease the concern or delegate its powers to another company for a specified term: **Hinckley v. Gildersleeve**, 19 Gr. 212. An agreement between a municipality and a street railway company for the payment by the company of a percentage of gross receipts held to be *intra vires* of both. **Hamilton v. Hamilton St. Ry.**, 5 C.R.C. 206; 10 O.L.R. 575. An agreement between a municipality and a street railway company to sell "workmen's" tickets during certain hours held to be *intra vires*. **Hamilton v. Hamilton Street Ry. Co.**, 5 C.R.C. 223; 10 O.L.R. 594. The guarantee of bonds of an elevator company by a railway company to which it was leased was held valid: **Royal Trust v. Great Northern Elevator Co.**, Q.R. 30, S.C. 499.

How Illegal Acts may be Restrained. Where an act is illegal and causes an injury to a private person differing from that suffered by the public the cases above cited show that the latter may apply for an injunction. See also Browne and Theobald, 4th Ed., p. 103; so also shareholders who can show that they are suffering by *ultra vires* action of the company may apply for an injunction: Halsbury's Laws of England, Vol. 5, p. 289.

But where it is sought to restrain *ultra vires* proceedings on the ground that they are a public injury such action should be taken by the Attorney-General: Brice, p. 751; Browne and Theobald, p. 95; **Attorney-General v. G.N.R. Co.**, 6 Jur. N.S. 1006; **Attorney-General v. Bergen**, 29 N.S.R. 135. Where it is alleged by a shareholder that the directors of the company are acting improperly and beyond their powers an action to restrain their doing so must be brought in the name of the company and not by the shareholder on behalf of himself and other shareholders: **McMurray v. Northern Ry. Co.**, 23 Grant 134.

Where an application is made by the Attorney-General to restrain illegal acts it is not necessary to show any pecuniary loss thereby. All that is necessary is to show some breach of a statutory obligation: **Attorney-General v. Ryan**, 5 Man. L.R. 81; **Attorney-General v. London and North Western Ry. Co.** (1899), 1 Q.B. 72; (1900), 1 Q.B. 78.

The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators where a complaint of this character is made is absolute: **London County Council v. Attorney-General** (1902), A. C. 165. Where by an Act extending the powers of a company certain obligations were imposed upon it for the benefit of customers but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, it was held that no individual customer had a right of action against the company but in case of any breach of its statutory duties the action must be brought in the name of the municipality with whom the agreement legalized by the statute was made: **Johnston v. Consumers' Gas Co.** (1898), A.C. 447.

Money Received Under Ultra Vires Contract. Where a company receives money belonging to another upon a contract which is **ultra vires**, the person entitled to it may recover from the company in an action upon the common counts: **Brockville & Ottawa Ry. Co. v. Canada Central Ry. Co.**, 41 U.C.R. 431; but the officers of a company who thus accept money for a purpose which the company has no power to carry out may be charged by the shareholders with it: **Walmsley v. Rent Guarantee Co.**, 29 Gr. 484.

See Halsbury, Vol. 5, pp. 337, 338.

Offices.

Head office.

73. (1) The head office of the company shall be in the place designated in the Special Act, but the company may, by by-law, from time to time, change the location of its head office to any place in Canada: Provided that notice of any such change shall be given to the Secretary of the Board.

Change of location.

To be registered.

(2) The Secretary of the Board shall keep a register wherein he shall enter all such changes of location so notified to him.

Other offices.

(3) The directors of the company may establish one or more offices in other places in Canada or elsewhere. R.S., c. 37, s. 80.

Change of Head Office. Compare 8 Vic., cap. 16, sec. 135 (Imp.). Under this section it is possible for a company by by-law to change its head office from one place to another in Canada provided the notice mentioned in the section is given. Formerly a railway company could not change its head office from the place specified in the Special Act incorporating it except by legislation amending the previous Act.

Service on Corporation....Before the present rules providing for service of corporation at any office at which they do business, difficult questions arose as to the method of service which ought to be adopted and it was laid down that a corporation was only domiciled at the place where its head office was situated and that service must be made at that place: See **Ralph v. G.W.R. Co.**, 14 Canada Law Journal 172; **Ahrens v. McGilligat**, 23 U.C.C.P. 171; **Westover v. Turner**, 26 U.C.C.P. 510; **Wilson v. Detroit etc., Ry. Co.**, 3 P.R. 37; **Taylor v. G.T.R.**, 4 P.R. 300; and it was held that service could not formerly have been effected upon a station agent at a subordinate though important station where the agent there acted under the direction of some authority at a central point. **Minor v. London & N.W. Ry. Co.**, 1 C.B.N.S. 325; **Brown v. London & N.W. Ry. Co.**, 4 B. & S. 326; **Palmer v. Caledonian Ry. Co.** (1892), 1 Q.B. 823. In the modern practice, however, the rules of practice in the various provinces generally provide that service may be made upon a railway company by serving certain named officers at its stations or offices in any such province and it is not now necessary therefore as a rule to serve a company at its head office where the same is outside the jurisdiction: **Tytler v. C.P. R.**, 29 O.R. 654, 26 A.R. 467. This point was much discussed in **Lamont v. C.P.R.**, 5 Terr. L.R. 60.

Where in the charter of a railway company, such as the Canadian Pacific R.W. Co., 44 Vic. (D.), cap. 1, clause 9 of the schedule, it is directed that a railway company may by by-law appoint a place within each province at which service is to be effected and that service at that point shall be as good as though made at the head office, it is doubtful whether such a provision for service is exclusive and over-rides the rules of practice in force in the Province as to service or not. In British Columbia it has been held that service must be made at the place designated by by-law: **Jordan v. McMillan**, 8 B.C.R. 27; **Hansen v. C.P.R.**, 8 B.C.R. 29; and the same rule has been laid down in the North-West Territories: **Lamont v. C.P. R.**, 5 Terr. L.R. 60. But in the Province of Ontario it has been held that the schedule to that statute can not

over-ride the general provisions in force in Ontario providing for service on corporations having their head office elsewhere: **Tytler v. C.P.R., supra.** Where a railway company has no head office within the Dominion of Canada it has been held in Manitoba that if it has an office and does business within that province it may be sued for work done there: **Crotty v. Oregon, etc., Ry. Co.,** 3 Man. L.R. 182.

Where the rules provided that a company should be served at its principal office or at one of them, if more than one, it was held that a service in Dublin, though an important office, was not sufficient where the chief office was in London. Also that if an address false to the knowledge of plaintiff were given in the writ the writ would be set aside: **Clokey v. London, etc., Ry. Co.** (1905), 2 Ir. K.B. 251.

Provisional Directors.

Provisional
directors.

74. (1) The persons mentioned by name as such in the Special Act shall be the provisional directors of the company.

Quorum.

(2) A majority of such provisional directors shall form a quorum.

Powers.

(3) The provisional directors may,—

- (a) forthwith open stock books and procure subscriptions of stock for the undertaking;
- (b) receive payments on account of stock subscribed;
- (c) cause plans and surveys to be made; and,
- (d) deposit in any chartered bank of Canada moneys received by them on account of stock subscribed.

Moneys
deposited.

(4) The moneys so received and deposited shall not be withdrawn, except for the purposes of the undertaking, or upon the dissolution of the company.

Tenure of
office.

(5) The provisional directors shall hold office as such until the first election of directors. R.S., c. 37, s. 81.

In **Selkirk v. Windsor, etc., Ry. Co.**, it was held by the trial judge, Riddell, J., that provisional directors of a provincial (Ontario) company, having, as he held, entered into a contract beyond their powers as such, were personally liable upon it as on a misrepresentation of

fact as to the organization of the company; but a Divisional Court and afterwards the Ontario Court of Appeal reversed the judgment, on the ground that the defendants' Special Act enlarged the powers of the provisional directors so as to enable them, with the sanction of the shareholders to enter into such a contract and that the sanction of the shareholders had, in substance, been given; and on the further ground that the company had accepted the benefit of the contract which was under the company's seal. **Selkirk v. Windsor, etc., Ry. Co.**, 20 O.L.R. 290; 21 O.L.R. 109; 22 O.L.R. 250; 12 C.R.C. 279 and 281.

75. If more than the whole stock has been subscribed, the provisional directors shall allocate and apportion the authorised stock among the subscribers as they deem most advantageous and conducive to the furtherance of the undertaking. R.S., c. 37, s. 82.

Allotment
of stock.

Capital.

76. (1) The capital stock of the company, the amount of which shall be stated in the Special Act, shall be divided into shares of one hundred dollars each.

Shares.

(2) The moneys raised from the capital stock shall be applied, in the first place, to the payment of all fees, expenses and disbursements for procuring the passing of the Special Act, and for making the surveys, plans and estimates of the works authorised by the Special Act; and all the remainder of such moneys shall be applied to the making, equipping, completing and maintaining of the railway, and other purposes of the undertaking. R.S., c. 37, s. 83.

Application
of proceeds.

Compare 8 Vic., cap. 16 (Imp.), secs. 6 and 65. The English statute being applicable to all kinds of companies does not prescribe the amount of the shares.

Application of Capital. This section gives promoters the right to reimburse themselves out of the capital stock for any expenses of organization for which they may have paid or become liable. When provisional directors or promoters in advance of the organization of a company act on behalf of the incorporators they may be personally liable for expenses properly incurred but will be entitled to contribution from those for whom they act in proportion to the amounts of their subscription for stock; **Sandusky v. Walker**, 27 O.R. 677; **Sylvester v. Mc-**

Cuaig, 28 U.C.C.P. 443. Where defendants took over the Grand Junction Railway Co., but without taking any stock in it, it was held that no capital stock in the Grand Junction Railway having been subscribed, there was nothing out of which the expenses of a preliminary survey could be paid and they were not liable merely by reason of their having acquired the other line: **Peterborough v. G.T.R.**, 18 U.C.R. 220. A person entering into an obligation on behalf of a company not yet formed will be personally liable: **Thomson v. Feeley**, 41 U.C.R. 229. Where work is performed, however, on behalf of a company afterwards incorporated the person performing the services may recover out of the funds of the company provided the services were such as are covered by the terms of the statute: **Hitchins v. Kilkenny Ry. Co.**, 9 C.B. 536; **Re Tilleard**, 11 W.R. 764; but a person employed as a clerk to the promoter of the company who has looked only to the promoter for payment cannot recover out of the funds of the company for work done in obtaining incorporation: **Re Kent Tramways Co.**, 12 Ch. D. 312. A promoter may, however, stipulate that he shall not be personally liable but that the work shall be paid for only out of the funds of the company when organized: **Parsons v. Spooner**, 5 Hare 102. A person may agree to indemnify a company against the costs of obtaining a Special Act notwithstanding the latter's liability under the above section, but an agreement to indemnify promoters will not relieve the company from liability for expenses of incorporation properly incurred: **Re Brampton, etc., Ry. Co.**, 10 Ch. App. 177; **Addison's Case**, 20 Eq. 620.

Other Purposes to which Capital may be Applied.
See notes to sec. 72. "General Powers."

Preferred Stock. No power is expressly given under the Railway Act to issue preferred stock, nor is it usual in granting charters to insert in the Special Act any provision for doing so. The question whether a company has power even with the consent of a majority of its shareholders to issue preferred stock is one of some difficulty, because the issuance of preferred stock whereby certain shareholders are to be paid dividends before the rest can receive any upon their stock has been held to be a breach of the rule that all shareholders are entitled to equal rights, unless the contrary is declared by statute, charter or expressed contract: **Lindley on Companies**, p. 399; **Hutton v. Scarboro Hotel Co.**, 2 Dr. & Sm. 514 and 521; **Northwest Electric Co. v. Walsh**, 29 S.C.R. 33; and

it is therefore safer where it is desired to issue preferred stock that the by-law providing for the issue of such shares should be unanimously sanctioned by the vote of the shareholders present in person or by proxy at a general meeting of the company duly called for considering the same or that it should be otherwise unanimously sanctioned in writing by the shareholders of the company. White's Canadian Company Law, 87. The case of **Hutton v. Scarboro**, however, was dissented from by Lord Macnaghten in **British v. Couper** (1894), A.C. 399; and in **Andrews v. Gas Meter Co.** (1897), 1 Ch. 361, **Hutton v. Scarboro** was definitely over-ruled, and it was held that the rights of shareholders in respect to their shares and the terms on which additional capital may be raised are matters to be regulated by the company and may be determined by it from time to time by special resolution and the court therefore upheld the validity of the resolution authorising the creation of preference shares. See also **Allen v. Gold Reefs** (1900), 1 Ch. 656; Buckley on Company Law, 9 Ed., pp. 23 and 24.

77. (1) So soon as twenty-five per centum of the capital has been subscribed, and ten per centum of the amount subscribed has been paid into some chartered bank in Canada, the provisional directors shall call a meeting of the shareholders of the company at the place where the head office is situate, at which meeting the shareholders who have paid at least ten per centum on the amount of stock subscribed for by them shall, from the shareholders possessing the qualifications hereinafter mentioned, elect the number of directors prescribed by the Special Act.

First meet-
ing of
shareholders.

(2) Notice of such meeting shall be given by advertisement for the time and in the manner hereinafter required for meetings of shareholders. R.S., c. 37, s. 84.

Notice
thereof.

78. (1) The original capital stock of the company may, with the approval of the Governor in Council, be increased, from time to time, to any amount, if—

Increase of
capital
stock.

(a) such increase is sanctioned by a vote, in person or by proxy, of the shareholders who hold at least two-thirds in amount of the subscribed stock of the company, at a meeting expressly called by the directors for that purpose; and,

By vote.

(b) the proceedings of such meeting have been en-

Minutes.

tered in the minutes of the proceedings of the company.

Notice of
meetings and
object.

(2) Notice in writing stating the time, place and object of such meeting, and the amount of the proposed increase, shall be given to each shareholder, at least twenty days previously to such meeting, by delivering the notice to the shareholder personally, or depositing the same in the post office, post paid, and properly directed to the shareholder. R.S., c. 37, s. 85.

Compare 26 & 27 Vic., cap. 118, sec. 12 (Imp.), and see sec. 13 of that statute as to the right in England to create and issue new preference shares.

Governor in Council. This term is defined by R.S.C. 1906, cap. 1, sec. 34 (7). It means "The Governor-General of Canada, or person administering the government of Canada for the time being, acting by and with the advice of or by and with the advice and consent of, or in conjunction with the King's Privy Council for Canada." This means in substance that an application must be made to the Cabinet administering the Government of Canada for the time being.

Notice of Meeting to Increase Stock. It should be noted that a notice calling a meeting under this section requires to be mailed to each shareholder or delivered to him personally and the provisions of section 105 *infra* for calling other meetings do not apply.

Shares.

Personal
property.

79. The stock of the company shall be personal property. R.S., c. 37, s. 86.

Corresponds to first part of 3 Edw. VII., cap. 58, sec. 97, the latter part of which section is now contained in sec. 82.

Compare 8 Vic., cap. 16, sec. 16 (Imp.).

Definition of Shares: "A share cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of a shareholder in a company measured for the purpose of liability and dividend by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with" the various acts respecting companies which may affect them "and made up of various rights

and liabilities contained in the contract including the right to a certain sum of money:" **Borland v. Steel** (1901), 1 Ch. 279, and apart from statute, shares are personal and not real property: **ibid.**

"It seems to me to be fallacious to assume that the provisions of the Act declaring that the stock of a company "shall be personal estate" were meant to give it all the attributes of goods and chattels; their purpose was to distinguish between real and personal property, and to give to the stock of all companies incorporated under the Act the character of personal estate, whether the property of the company—and so of the shareholders—happened to be real or personal, adopting the rule in equity in regard to the share of a partner in a partnership." Meredith, J.A., in **Re Good and Jacob Y. Shantz Son & Co., Limited**, 23 O.L.R. at p. 544.

80. (1) No transfer of shares, unless made by sale under execution, or under the decree, order or judgment of a court of competent jurisdiction, shall be valid for any purpose whatever, until entry thereof is duly made in the register of transfers, except for the purpose of exhibiting the rights of the parties thereto towards each other, and of rendering the transferee liable, in the meantime, jointly and severally, with the transferor, to the company and its creditors: Provided that, as to the stock of any company listed and dealt with on any recognized stock exchange by means of scrip, commonly in use endorsed in blank and transferable by delivery, such endorsement and delivery shall, excepting for the purpose of voting at meetings of the company, constitute a valid transfer. R.S., c. 37, s. 87. Am. **See Revised Statutes of Quebec, 1909. Article 6052.**

Registration
of transfers.

Exception as
to listed
shares repre-
sented by
scrip.

This section is virtually new. Section 87 of the Act of 1906 (95 of the Act of 1903) read as follows:

"87. Shares in the company may be sold and transferred by the holders thereof by instrument in writing, made in duplicate.

2. One of such duplicate transfers shall be delivered to the directors to be filed and kept for the use of the company, and an entry thereof shall be made in a book to be kept for that purpose.

3. No interest or dividend on the shares transferred shall be paid to the purchaser until such duplicate is so delivered, filed and entered."

As to the right of directors, or of the company to impose restrictions on the transfer of shares, see cases cited under sec. 82, *infra*.

81. (1) Transfers, except in the case of fully paid-up shares, shall be in the form following, or to the like effect, varying the names and descriptions of the contracting parties as the case requires, that is to say:—

Form of
transfer.

“I, (A.B.), in consideration of the sum of paid to me by (C.D.), hereby sell and transfer to him share (or shares) of the stock of the , to hold to him, the said (C.D.), his executors, administrators and assigns (or successors and assigns, **as the case may be**), subject to the same rules and orders and on the same conditions upon which I held the same immediately before the execution hereof. And I, the said (C.D.), do hereby agree to accept of the said (A.B.’s) share (or shares) subject to the same rules, orders and conditions.

“Witness our hands this day of , in the year 19 .”

As to paid-up shares.

(2) In the case of fully paid shares the transfer may be in such form as is prescribed by by-law of the company. R.S., c. 37, s. 88.

Restrictions on transfers.

82. (1) No shares shall be transferable until all previous calls thereon have been fully paid up, or until the said shares have been declared forfeited for the non-payment of calls thereon.

Whole share.

(2) No transfer of less than a whole share shall be valid. R.S., c. 37, s. 89.

Certificate of proprietorship of share.

83. The certificate of proprietorship of any share shall be **prima facie** evidence of the title of any shareholder, his executors, administrators or assigns, or successors and assigns, as the case may be, to the share therein specified. R.S., c. 37, s. 71.

Compare 8 Vic., c. 16, sec. 20 (Imp.).

Sale without certificate.

84. The want of a certificate of proprietorship shall not prevent the holder of any share from disposing thereof. R.S., c. 37, s. 90.

See notes to sec. 80.

Transmission of stock otherwise

85. (1) If any share in the capital stock of the company is transmitted by the death, bankruptcy, last will

and testament, **donatio mortis causa**, or by the intestacy of any shareholder, or by any lawful means other than the transfer hereinbefore mentioned, the person to whom such share is transmitted shall deposit in the office of the company a statement in writing signed by him, which shall declare the manner of such transmission, and he shall deposit therewith a duly certified copy or probate of such will and testament, or sufficient extracts therefrom, and such other documents and proofs as are necessary.

than by
transfer.

(2) The person to whom the share is so transmitted as aforesaid, shall not, without complying with this section, be entitled to receive any part of the profits of the company, or to vote in respect of any such share as the holder thereof. R.S., c. 37, s. 91.

Transferee
must comply

Compare 8 Vic., c. 16, sec. 18 (Imp.).

Evidence of Transmission in case of death is in practice generally furnished by depositing a certified copy of the letters probate or letters of administration and, if required, producing the original for inspection. In Quebec in cases of intestacy evidence of the death of the shareholder, the birth of the heirs and other evidence of heirship, and where there has been a partition, a copy of the deed of partition may be required: Abbott, p. 48.

Transfer by Execution. By R.S.O. 1914, cap. 80, sec. 12, shares are personal property and are exigible under execution and by sec. 13 the sheriff can make the seizure by serving notice of the writ on the company and thereupon any transfer by the execution debtor will be invalid and dividends are payable to the sheriff who may sell the stock. Where seizure could not be made under execution the practice adopted was to apply by petition for a charging order under 1 & 2 Vic., cap. 110, sec. 14, and 3 & 4 Vic., cap. 82, sec. 1 (Imp.), upon the assumption that those acts were in force in Ontario: **Allan v. Phelps**, 23 Gr. 395; **Caffrey v. Phelps**, 24 Gr. 344, but even where the stock had been fraudulently assigned to prevent seizure the statutes did not apply: **Caffrey v. Phelps**, *supra*.

86. The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any share or security issued by it is subject, whether or not the company has had notice of the trust; and it may treat the registered holder as the

Company not
bound to see
to execution
of trusts.

absolute owner of any such share or security, and shall not be bound to recognize any claim on the part of any other person whomsoever, with respect to any such share or security, or the dividend or interest payable thereon: Provided, that nothing in this section contained shall prevent a person equitably interested in any such share or security from procuring the intervention of the court to protect his rights. R.S., c. 37, s. 92.

Non-payment
of calls.

87. (1) Every shareholder who makes default in the payment of any call payable by him, together with the interest, if any, accrued thereon, for the space of two months after the time appointed for the payment thereof, shall forfeit to the company his shares in the company, and all the profit and benefit thereof.

Forfeiture.

Procedure.

(2) No advantage shall be taken of the forfeiture unless the shares are declared to be forfeited at a general meeting of the company, assembled at any time after such forfeiture has been incurred. R.S., c. 37, s. 93.

Effect of
forfeiture.

88. Every shareholder so forfeiting shall be by such declaration of forfeiture relieved from liability in all actions, suits or prosecutions whatsoever which may be commenced, or prosecuted against him for any breach of the contract existing between such shareholder and the other shareholders by reason of such shareholder having subscribed for or become the holder of the shares so forfeited. R.S., c. 37, s. 94.

The words "declaration of" are new.

Sale of
forfeited
shares.

89. (1) The directors may, subject as hereinafter provided, sell, either by public auction or private sale, any shares so declared to be forfeited, upon authority therefor having been first given by the shareholders, either at the general meeting at which such shares were declared to be forfeited, or at any subsequent general meeting.

Limitation.

(2) The directors shall not sell or transfer more of the shares of any such defaulter than will be sufficient, as nearly as can be ascertained at the time of such sale, to pay the arrears then due from such defaulter on account of any calls, together with interest, and the expenses attending such sale and declaration of forfeiture.

(3) If the money produced by the sale of any such forfeited shares is more than sufficient to pay all arrears of calls and interest thereon due at the time of such sale, and the expenses attending the declaration of forfeiture and the sale of such shares, the surplus shall, on demand, be paid to the defaulter.

Surplus proceeds to defaulter.

(4) If payment of such arrears of calls and interest and expenses is made before any share so forfeited and vested in the company is sold, such share shall revert to the person to whom it belonged before such forfeiture, who shall be entitled thereto as if such calls had been duly paid.

Payment of arrears before sale.

(5) Any shareholder may purchase any forfeited share so sold. R.S., c. 37, s. 95.

Any shareholder may purchase.

Compare 8 Vic., cap. 16, secs. 32, 34 & 35 (Imp.). This section is substantially the same as in the Act of 1903. In the Act of 1903 the section (105 in that Act) was considerably changed from the former section 83 of 51 Vic., cap. 29.

Under the former section 83 the terms on which directors might sell were expressed in somewhat wider language and they were given power to sell unissued shares and to pledge such shares for repayment of loans to the company. These powers are not now conferred except so far as the power of directors to receive subscriptions and allot stock under sections 74 to 78, *ante*, gives the right to deal with any unissued stock.

90. (1) A certificate of the treasurer of the company that any share of the company has been declared forfeited for non-payment of any call, and that such share has been purchased by a purchaser therein named shall, together with the receipt of the treasurer of the company for the price of such share, constitute a good title thereto.

Certificate of treasurer to constitute title.

(2) Such certificate shall be by the treasurer registered in the name and with the place of abode and occupation of the purchaser, and shall be entered in the books to be kept by the company, and such purchaser shall thereupon be deemed to be the holder of such share.

To be registered.

(3) The purchaser shall not be bound to see to the application of the purchase money.

Purchase money.

Irregularity.

(4) The title of the purchaser to such share shall not be affected by any irregularity in the proceedings in reference to such sale. R.S., c. 37, s. 96.

Compare 8 Vic., cap. 16, sec. 33 (Imp.).

Certificate of forfeiture of share.

91. A certificate of the treasurer of the company that any share of the company has been declared forfeited for non-payment of any call or interest accrued thereon, and that such share has been purchased by a purchaser therein named shall be sufficient evidence of such facts. R.S., c. 37, s. 72.

Shareholders may advance

92. (1) Any shareholder who is willing to advance the amount of his shares, or any part of the money due upon his shares, beyond the sums actually called for, may pay the same to the company.

Interest.

(2) Upon the principal moneys so paid in advance, or so much thereof as, from time to time, exceeds the amount of the calls then made upon the shares in respect of which such advance is made, the company may pay such interest at the lawful rate of interest for the time being, as the shareholders, who pay such sum in advance, and the company agree upon.

No interest out of capital.

(3) Such interest shall not be paid out of the capital subscribed. R.S., c. 37, s. 97.

See note to sec. 129: "Interest on amount called in."

Limited liability.

93. Every shareholder shall be individually liable to the creditors of the company for the debts and liabilities of the company to an amount equal to the amount unpaid on the stock held by him, and until the whole amount of his stock has been paid up: Provided that no action shall be instituted or maintained against any such shareholder in respect of his said liability until an execution at the suit of the creditor against the company has been returned unsatisfied in whole or in part. R.S., c. 37, s. 98.

Compare 8 Vic., cap. 10, secs. 36 and 37 (Imp.). See also notes to sections 96 and 102, *infra*.

Right to Inspect Register. In England an express right to inspect the register is given for the purpose of finding whether a person is a shareholder or not; and the right to inspect includes the right to take copies: **Mutter v. Eastern, etc., Ry. Co.**, 4 Times L.R. 377; **Meader v. Isle**

of **Wight Co.**, 9 W.R. 750; **Reg. v. Derbyshire, etc., Ry. Co.**, 3 E. & B. 784; no such right is given under this statute, and as the remedy is a purely statutory one it may be that the creditor will, in Canada, have no right to an inspection.

94. Municipal corporations in any province of Canada duly empowered so to do by the laws of the province may, subject to the limitations and restrictions in such laws prescribed, subscribe for any number of shares in the capital stock of the company. R.S., c. 37, s. 99.

Municipal
corporations
may take
stock.

Subscription by Municipalities. As pointed out by Armour, C.J.O. in **Whitby v. G.T.R.**, 1 C.R.C. at p. 273, municipal corporations have no power at common law to grant bonuses to a railway, and this applies equally to aiding a railway by subscribing for stock. This power could only be granted to them by statute and the provisions of the Acts thus enabling them to subscribe for stock must be **bona fide** complied with: **Scott v. Tillsonburg**, 13 A.R. 233; see **Re Campbell and Village of Lanark**, 20 A.R. 372. These powers were first conferred in 1851 by sec. 18, sub-secs. 1 to 3 of 14 & 15 Vic., cap. 51; and the present clause is an amendment of that section. It is to be noted, however, that this clause does not in itself confer power upon municipalities to subscribe for stock, but merely provides that when empowered by the laws of the Province to do so they may subscribe in the manner mentioned in the above section.

In **Higgins v. Whitby**, 20 U.C.R. 296, it was held that where a municipality subscribed pursuant to one of its by-laws passed under 14 & 15 Vic., cap. 51, sec. 18, it had power to require that payment might be made in debentures and not in cash and in an action brought against it by a judgment creditor to recover the amount unpaid on its stock under section 19 of that statute, now sec. 93, **supra**, the municipality was at liberty to plead that it was not required to pay its subscription in cash, but only in debentures. Though such a defence might not be open to an ordinary shareholder it was open to the municipality because under the above statute it could only subscribe upon the condition specified in its by-law. Where a municipality had agreed to pay for stock by paying contractors as the work progressed and they did so, thus paying the full amount of their indebtedness, it was held that this was a sufficient payment and that they were not liable merely because the money had not gone to the credit of the company as would have to be done in a case

of an ordinary shareholder: **Woodruff v. Peterborough**, 22 U.C.R. 274.

Irregularities in Procedure. Where under 14 & 15 Vic., cap. 51, sec. 18, the procedure required for obtaining the assent of electors had not been minutely followed, but substantial notice had been given and a large amount of money had been borrowed upon the faith of the aid rendered by the municipality, it was held that the details of the notice and assent required by that section were not imperative and a by-law approved by the electors could not be set aside. Under the present law these details would have to be sought for under the local Municipal Acts as by sec. 94 the subscription must be made subject to the provisions of those statutes. The principle of this case would, however, no doubt apply: **Re Boulton v. Peterborough**, 16 U.C.R. 380. Where it is proposed to submit a by-law for granting aid to a railway company it seems that such by-law should contain proper conditions as to the expenditure of the money as contemplated by the statutes enabling the municipality to grant such aid: **Re North Simcoe Ry. Co. v. Toronto**, 36 U.C.R. 101.

Validity of Conditions Imposed. The following conditions made by municipalities in rendering aid to railroads have been upheld: That a bonus shall only be payable upon the certificate of some competent person: **Bickford v. Chatham**, 10 O.R. 257; 14 A.R. 32; 16 S.C.R. 235. That machine shops shall be located and maintained within the limits of the municipality: **City of Toronto v. Ontario & Quebec Ry. Co.**, 22 O.R. 344. That the company shall remain independent: **Halton v. G.T. Ry. Co.**, 19 A.R. 252; 21 S.C.R. 716. That it shall grant running powers to other companies and procure other companies to erect stations: **Haldimand v. Hamilton, etc., Ry. Co.**, 27 U.C.C.P. 228. That the line should be completed and in running order within a specified time: **Luther v. Wood**, 19 Gr. 348. But the right of the company to the aid granted depends only on the conditions set out in the by-law and bonuses can not be withheld because of the non-performance by the company of the covenants contained in a separate agreement: **Bickford v. Chatham, supra**; nor can such covenants be set out on the face of the debentures issued by the municipality as the latter must be negotiable instruments: **St. Cesaire v McFarlane**, 14 S.C.R. 738.

Aliens.

95. All shareholders in the company, whether British subjects or aliens, or residents in Canada or elsewhere, shall have equal rights to hold stock in the company, and

to vote on the same, and, subject as herein provided, shall be eligible to office in the company. R.S., c. 37, s. 100. Shareholders have equal rights.

Section 113 (3) provides that a majority of the directors shall be British subjects, unless the Governor in Council otherwise permits. This restriction in the former Act was absolute, but applied only to companies subsidized by the Dominion.

96. A true and perfect account of the names and places of abode of the several shareholders shall be entered in a book, which shall be kept for that purpose, and which shall be open to the inspection of the shareholders. R.S., c. 37, s. 101. Record of shareholders.

Compare 8 Vic., cap. 16, sec. 9 (Imp.).

As to creditors' right to inspect register see notes to sec. 93, *ante*, "right to inspect register."

Calls.

97. (1) The directors may, from time to time, make such calls of money as they deem necessary upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, if the intervals between such calls, the notices of each call, and the other provisions of this Act and of the Special Act, in respect of calls, are duly observed and given. How made.

(2) At least thirty days' notice shall be given of each call. Notice.

(3) No call shall exceed ten per centum of the amount of each share subscribed, unless otherwise provided in the Special Act. Amount.

This sub-section, in the Act of 1906, read: "No call shall exceed the amount prescribed in the Special Act."

The words "ten per centum of the amount of each share subscribed" were inserted to conform to a provision usually inserted hitherto in Special Acts.

(4) No call shall be made at a less interval than two months from the previous call. Intervals.

(5) A greater amount shall not be called in, in any one year, than the amount prescribed in the Special Act. Annual amount.

(6) Nothing herein contained shall prevent the directors from making more than one call by one resolution of the Board. R.S., c. 37, s. 125. Am. Resolution.

Compare 8 Vic., cap. 16, sec. 22 (Imp.).

Publication
of notice of
call.

98. (1) At least four weeks' notice of any call upon the shareholders of the company shall be given by weekly publication in the **Canada Gazette**, and in at least one newspaper published in the place where the head office of the company is situate.

Evidence.

(2) A copy of the **Canada Gazette** containing any such notice shall on production thereof be sufficient evidence of such notice having been given. R.S., c. 37, s. 126.

Proof of Notice. It is to be noted that while this sec. and sec. 105 require publication of the notice both in the **Canada Gazette** and in a paper published where the head office is situate, it is only necessary to prove that it was published in the **Gazette**, unless the two sections can be construed to mean that production of the **Gazette** is only evidence of publication in that paper and that publication in the local paper must be proved in the usual way. The section is obscure; it originally appeared as 14 & 15 Vic., cap. 51, sec. 16, sub-sec. 24, but there no notice in a local paper was required and production of the **Gazette** was made **conclusive** evidence of notice. Under this section, production of a **Gazette** of May 28th, containing a notice dated March 15th, was not accepted as evidence of notice given prior to the date of the **Gazette**; **Buffalo, etc., Ry. Co. v. Parke**, 12 U.C.R. 607.

The provision in sec. 151 (6) making production of the **Canada Gazette** containing the notice of an amalgamation agreement **prima facie** proof that the various requirements of that section have been complied with, lends support to the contention that under sec. 98 production of the **Gazette** is to be regarded as **prima facie** proof of newspaper publication also.

Forms and Requisites of Notice. The notice must specify time and place of payment: **Great North, etc., R. W. Co. v. Biddulph**, 7 M. & W. 243; where notice must be published in every district in which stock may be held; failure to publish in one district is no defence to a shareholder living in another: **Provincial v. Cameron**, 31 U.C.C.P. 523, **Provincial v. Worts**, 9 A.R. 56.

And see section 105.

Liability of
shareholder.

99. Every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons, and at the times and places, from

time to time, appointed by the company or the directors. R.S., c. 37, s. 127.

Compare 8 Vic., cap. 16, sec. 22 (Imp.), last part.

100. If, on or before the day appointed for payment of any call, any shareholder does not pay the amount of such call, he shall be liable to pay interest upon such amount, at the rate of five per centum per annum, from the day appointed for the payment thereof to the time of the actual payment. R.S., c. 37, s. 128.

Overdue calls
bear interest.

Five per
cent.

101. If, at the time appointed for the payment of any call, any shareholder fails to pay the amount of the call, he may be sued therefor in any court of competent jurisdiction, and such amount shall be recoverable with lawful interest from the day on which the call became payable. R.S., c. 37, s. 129.

Failure to
pay call.
Suit.

Compare 8 Vic., cap. 16, sec. 24 (Imp.).

102. In any action or suit to recover any money due upon any call, it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is the holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more, upon one share or more, stating the number and amount of each of such calls. R.S., c. 37, s. 130.

Pleadings.

Compare 8 Vic., cap. 16, sec. 26 (Imp.).

Meetings of Shareholders.

103. (1) A general meeting of the shareholders for the election of directors, and for the transaction of other business connected with or incident to the undertaking, to be called the annual meeting, shall be held annually on the day mentioned in the Special Act, or on such other day as the directors may determine.

Annual
meeting.

(2) Other general meetings, to be called special meetings, may be called at any time by the directors, or by shareholders representing at least one-fourth in value of the subscribed stock, if the directors, having been requested by such shareholders to convene a special meeting, fail, for twenty-one days thereafter, to call such meeting. R.S., c. 37, s. 102.

Special
meetings.

Compare 8 Vic., cap. 16, secs. 66, 67 and 70 (Imp.).

At head
office.

104. All general meetings, whether annual or special, shall be held at the head office of the company. R.S., c. 37, s. 103.

Notice of
meetings.

105. (1) At least four weeks' public notice of any meeting shall be given by advertisement published in the **Canada Gazette**, and in at least one newspaper published in the place where the head office is situate.

Place and
day.

(2) Such notices shall specify the place and the day and the hour of meeting.

Publication.

(3) All such notices shall be published weekly.

Evidence
of notice.

(4) A copy of the **Canada Gazette** containing such notice shall, on production thereof, be sufficient evidence of such notice having been given. R.S., c. 37, s. 104.

Under 8 Vic., cap. 16, sec. 71 (Imp.), 14 days' notice is required and it has been decided that this means clear days: Browne & Theobald, 4th Ed., 96, but see **Portland v. Pratt** 2 (All.). 7 N.B.R. 17.

And see sec. 98 as to notice of calls.

Business.

106. (1) Any business connected with or incident to the undertaking may be transacted at an annual meeting except such business as is, by this Act or the Special Act, required to be transacted at a special meeting.

At special
meeting.

(2) No special meeting shall enter upon any business not set forth in the notice upon which it is convened. R. S., c. 37, s. 105.

Compare 8 Vic., c. 16, secs. 66 and 67 (Imp.).

Voting.

107. The number of votes to which each shareholder shall be entitled, at any meeting of the shareholders, shall be in the proportion of the number of shares held by him, on which all calls due have been paid. R.S., c. 37, s. 106.

Compare 8 Vic., cap. 16, sec. 75 (Imp.).

By proxy.

108. (1) Every shareholder, whether resident in Canada or elsewhere, may vote by proxy, if he sees fit, and if such proxy produces from his constituent an appointment in writing, in the words or to the effect following, that is to say:—

Form of
proxy.

"I, _____ of _____, one of the
shareholders of the _____, do hereby appoint
of _____, to be my

proxy, and in my absence, to vote or give my assent to any business, matter or thing relating to the undertaking of the said that is mentioned or proposed at any meeting of the shareholders of the said company, in such manner as he, the said thinks proper.

"In witness whereof, I have hereunto set my hand and seal the day of in the year ."

(2) The votes by proxy shall be as valid as if the constituents had voted in person. R.S., c. 37, s. 107.

Valid.

Compare 8 Vic., c. 16, secs. 76 and 77 (Imp.).

109. (1) Every matter or thing proposed or considered at any meeting of the shareholders shall, except as otherwise specially provided, be determined by the majority of votes and proxies then present and given.

Majority vote.

(2) All decisions and acts of any such majority shall bind the company and be deemed the decisions and acts of the company. R.S., c. 37, s. 108.

Binding.

The words "except as otherwise specially provided" are new. Compare secs. 151 (1) and 154.

Compare 8 Vic., c. 16, sec. 76. And see notes to sec. 103.

110. All notices given by the secretary of the company by order of the directors shall be deemed notices by the directors of the company. R.S., c. 37, s. 109.

Notices by secretary.

See notes to secs. 103 and 106.

President and Directors.

111. (1) A board of directors of the company, to manage its affairs, the number of whom shall be stated in the Special Act, shall be chosen at the annual meeting.

Chosen at annual meeting.

(2) If such election is not held at the annual meeting, the directors shall cause such election to be held at a special meeting duly called for that purpose, within as short a delay as possible after the annual meeting.

Or special meeting.

(3) No person shall vote at such special meeting except those who would have been entitled to vote if the election had been held at the annual meeting. R.S., c. 37, s. 110.

Voting.

Compare 8 Vic., cap. 16, secs. 81, 82 and 83 (Imp.).

Powers of Provisional Directors. See notes to sections 74 and 75, *ante*.

Municipal
corporations
to be
represented.

112. The mayor, warden, reeve or other head officer of any municipal corporation, in any province of Canada holding stock in any company to the amount of twenty thousand dollars or upwards, shall be **ex officio** one of the directors of the company, in addition to the number of directors authorised by the Special Act, unless in such Special Act provision is made for the representation of such corporation on the directorate of such company. R.S., c. 37, s. 111.

Qualifications
of directors.

113. (1) No person shall be a director unless he is a shareholder, owning twenty shares of stock, and has paid all calls due thereon, and is qualified to vote for directors at the election at which he is chosen.

Disability of
officers,
contractors
and sureties.

(2) No person who holds any office, place or employment in the company, or who is concerned or interested in any contract under or with the company, or is surety for any contractor with the company, shall be capable of being chosen a director, or of holding the office of director.

Majority of
directors
British
subjects.

(3) A majority of the directors shall be British subjects, unless the Governor in Council otherwise permits. R.S., c. 37, s. 112. Am.

Sub-section 3, as it appeared in former Acts, required merely that a majority of directors of companies which had been aided by Parliament, should be British subjects. The restriction is now made to apply to all companies under the Act, subject to the provision, which is new, that permission may be given by the Governor in Council. An amendment to provide that the restriction should not apply to a line extending into Canada operated by a foreign railway as part of its system was rejected by the Committee of Parliament revising the Act.

Term of
office.

114. The directors appointed at the last election, or those appointed in their stead in case of vacancy, shall remain in office until their successors are appointed. R.S., c. 37, s. 113. Am.

Instead of "until their successors are appointed," the Act of 1906 had "until the next ensuing election of directors."

Vacancies in
directorates.

115. Vacancies in the board of directors shall be filled in the manner prescribed by the by-laws. R.S., c. 37, s. 114.

116. (1) In case of the death, absence or resignation of any of the directors, others may, unless otherwise prescribed by the by-laws, be appointed in their stead by the remaining directors. How filled.

(2) In case such remaining directors do not constitute a quorum, the shareholders, at a special meeting to be called for that purpose, may, unless otherwise prescribed in the by-laws, elect such other directors. If no quorum.

(3) If such appointment or election is not made, such death, absence or resignation shall not validate the acts of the remaining directors. R.S., c. 37, s. 115. If not filled.

117. (1) The directors shall, at their first or some other meeting after their election, elect one of their number to be the president of the company; and they may, in like manner, elect one or more vice-presidents. President.

(2) The president shall hold his office until he ceases to be a director, or until another president has been elected in his stead, and unless otherwise provided by by-law, shall always, when present, be the chairman of and preside at all meetings of the directors. Vice-president.

(3) In the absence of the president the vice-president, or one of the vice-presidents, according to such priority as may be prescribed by by-law or determined by the directors, shall act as chairman. Tenure.

(4) In the absence of the president and the vice-president, or vice-presidents, the directors at any meeting at which not less than a quorum are present, shall be competent to elect a chairman from among their number to preside at such meeting. R.S., c. 37, s. 116. Am. Duties.

The corresponding section of the Act of 1906 provided for only one vice-president. See sec. 122 and notes to sec. 124. Chairman.

The words "be the chairman of and" have been inserted in sub-sec. 2. Subsection 4 is new.

118. (1) A majority of the directors shall form a quorum. Quorum.

(2) The directors at any meeting regularly held, at which not less than a quorum are present, shall be competent to exercise all or any of the powers vested in the directors; and the act of a majority of a quorum of the Acts of quorum binding.

directors present at any such meeting shall be deemed the act of the directors. R.S., c. 37, s. 117.

Votes of
directors.

119. No director shall have more than one vote, except the chairman, who shall, in case of a division of equal numbers, have the casting vote. R.S., c. 37, s. 118.

Casting vote.

Directors
subject to
shareholders
and by-laws.

120. The directors shall be subject to the examination and control of the shareholders at their annual meetings, and shall be subject to all by-laws of the company, and to the orders and directions from time to time made or given at the annual or special meetings if such orders and directions are not contrary to or inconsistent with any express direction or provision of this Act or of the Special Act. R.S., c. 37, s. 119.

Directors not
to contract
with
company.

121. No person who is a director of the company shall enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company, other than a contract which relates to the purchase of land necessary for the railway, nor shall any such person be or become a partner of or surety for any contractor with the company. R.S., c. 37, s. 120.

See note, "Contracts with Directors," under sec. 113.

This section was held *intra vires* of the Dominion Parliament, in **Macdonald v. Riordon**, 30 S.C.R. 619.

Directors
may make
by-laws.

122. (1) The directors may make by-laws or pass resolutions, from time to time, not inconsistent with law, for,—

- (a) the management and disposition of the stock, property, business and affairs of the company,
- (b) the appointment of all officers, servants and artificers, and the prescribing of their respective duties and the compensation to be made therefor; and,
- (c) the retirement of such of said officers and servants, on such terms as to an annual allowance or otherwise, as in each case the directors, in the interest of the company's service, and under the circumstances, consider just and reasonable.

By-laws for
election
of officers.

(2) The directors may also, from time to time, make by-laws or pass resolutions for the election or appointment of officers of the company, who need not be direct-

ors, as vice-presidents of the company, and may by any such by-law or resolution specify the manner of such election or appointment and define the powers, duties, qualifications and term of office of such vice-presidents, each of whom shall have and may exercise, subject to the limitations set forth in any such by-law or resolution, all the powers of a vice-president elected by the directors pursuant to the provisions of section one hundred and seventeen of this Act.

(3) A copy of any such by-law or resolution certified as correct by the president, secretary or other executive officer of the company and bearing the seal of the company shall be evidence thereof. R.S., c. 37, ss. 76, 121; 1910, c. 50, s. 3. Am. Evidence.

Sub-section 2 was passed in 1910. Sub-section 3 is taken from sec. 76 of the Act of 1906, with the substitution of "any such by-law or resolution" for "any by-law, rule or regulation of the company."

See notes to sec. 106 as to notices dealing with the affairs of the Company and see **Waddell v. Ontario Canning Co.**, 18 O.R. 41, p. 51.

Interpretation. By R.S.C., cap. 1, sec. 34 (24), the word "may" is permissive only and such decisions as **Julius v. Bishop of Oxford**, 5 A.C., 214, holding that this word sometimes imposes a duty would not apply. By sec. 2 (2) *ante*, a by-law is to include a resolution so that the words "or pass resolutions" are hardly necessary.

123. The directors shall, from time to time, appoint such officers as they deem requisite, and shall take such sufficient security as they think proper from the managers and officers, for the time being, for the safe-keeping and accounting for by them respectively of the moneys raised by virtue of this Act and the Special Act, and for the faithful execution of their duties. Appointment
of officers.

(2) Such security may, as the directors deem expedient, be by bond or by the guarantee of any society or joint stock company incorporated and empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of persons occupying positions of trust, or for other like purposes. R.S., c. 37, s. 122. By bond or
guarantee.

Vice-President,
powers of.

124. (1) In case of the absence or illness of the president, the vice-president or one of the vice-presidents shall have all the rights and powers of the president, and may sign all debentures and other instruments, and perform all acts which, by the regulations and by-laws of the company, or by the Special Act, are required to be signed, performed and done by the president.

Empowering
a director to
act.

(2) In the absence or illness of the president and the vice-president, or vice-presidents, any director of the company acting under the express authority of the board of directors may while so acting exercise the rights and powers of the president or vice-president as hereinbefore set forth.

Entry in
minutes.

(3) The directors may, at any meeting of the directors, require the secretary of the company to enter such absence or illness among the proceedings of such meeting.

Evidence of
absence or
illness.

(4) A certificate of any such absence or illness, signed by the secretary of the company shall be delivered to any person requiring the same on payment to the treasurer of one dollar, and such certificate shall be **prima facie** evidence of the absence or illness therein certified. R.S., c. 37, s. 123. Am.

The words "or one of the vice-presidents," in sub-sec. 1 are new. See notes to sec. 117. Sub-sec 2 is new. Sub-sec. 4 has been amended by omitting the words "of the president" after "illness" and by substituting "of the absence or illness therein certified" for the words "of such absence or illness at and during the period in the said certificate mentioned."

Section 116 of the Act of 1906 provided for only one vice-president, who was to be elected by the directors from among themselves, and section 123 of that Act provided that "the vice-president" should have the rights and powers of the president in case of the latter's absence or illness. But by section 3 of 9-10 Edw. VII., c. 50 (section 122 (2) of the present Act) the directors were empowered to pass by-laws or resolutions for the election or appointment of other vice-presidents "who need not be directors," and these others, subject to any limitations in such by-laws or resolutions, were given all the powers of a vice-president elected under section 116. Sections 116 and 123 of the Act of 1906 having now been amended to the form in which they appear as sections 117 and 124

of the present Act, the result would appear to be that the powers of the president might on occasion be exercised in his absence by any one of several vice-presidents who were not directors, unless they were limited in their authority by the by-law or resolution referred to in section 122 (2); and it would be only in the event of the absence or illness of the president and of all the vice-presidents, whether elected under section 117 or elected or appointed under section 122, that the directors could act under section 124 (2). There must, however, be some difference between the powers of vice-presidents holding office under sections 117 and 122 (2) respectively, for the latter are not made directors, nor given the powers of directors, and it is submitted, that notwithstanding sec. 117 (3), they cannot preside or vote at directors' meetings by virtue of their being vice-presidents; nor can they be counted for the purpose of determining a quorum. It is expressly said that they "need not be directors." And it is submitted (though the wording of the three sections in question 117, 122 and 124, bears a different construction) that the vice-presidents intended by section 124 are those referred to in section 117, and the proceedings before the Special Committee of Parliament, 28th April 1917, appear to support this view. If that was the intention, however, the last three lines of section 122 (2) are much too sweeping.

For a discussion of the powers of vice-president, see **Hamilton v. Gore Bank**, 20 Gr. 190.

125. Copies of the minutes of proceedings and resolutions of the shareholders of the company, at any annual or special meeting, and of the minutes of proceedings and resolutions of the directors, at their meetings, extracted from the minute book, kept by the secretary of the company, and by him certified to be true copies extracted from such minute book, when sealed with the company's seal, shall, without proof of the signature of such secretary, be evidence of such proceedings and resolutions. R.S., c. 37, s. 70.

Copies of
minutes to
be evidence.

Compare 8 Vic., c. 16, sec. 98 (Imp.).

126. The directors shall cause to be kept, and, annually, on the thirty-first day of December, to be made up and balanced, a true, exact and particular account of the moneys collected and received by the company, or by the directors or managers thereof, or otherwise for the use of the company, and of the charges and expen-

Accounts.

ses attending the erecting, making, supporting, maintaining and carrying on of the undertaking, and of all other receipts and expenditures of the company or the directors. R.S., c. 37, s. 124. Am.

For returns required see sections 437 to 441.

"The thirty-first day of December" has been substituted for "the thirtieth day of June." Compare sec. 31.

Dividends and Interest.

Declaration
of dividends.

127. Dividends, at and after the rate of so much per share upon the several shares held by the shareholders in the stock of the company, may, from time to time, be declared and paid by the directors out of the net profits of the undertaking. R.S., c. 37, s. 131.

Compare 8 Vic., cap. 16, sec. 120 (Imp.).

The Act of 1888 required that the declaration of dividend should be at the annual meeting. In the Act of 1903 this was changed to a general meeting. Now dividends may be declared from time to time by the directors and it is not necessary to obtain the sanction of the shareholders.

Reserve
fund.

128. (1) The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve fund, to meet contingencies, or for equalizing dividends, or for repairing, maintaining, renewing or extending the railway or any portion thereof, and shall submit their action in regard to such reserve fund to the shareholders at a general meeting for their approval.

How
invested.

(2) The directors may invest the sum so set apart as a reserve fund in such securities, not inconsistent with this or the Special Act, as they select. R.S., c. 37, s. 132.

This section first appeared in the Act of 1903. In England by 8 Vic., cap. 16, sec. 122, the directors are authorised to set aside a fund for contingencies before apportioning profits.

No dividend
out of
capital.

129. No dividend shall be,—

- (a) declared whereby the capital of the company is in any degree reduced or impaired; or,
- (b) paid out of such capital; or,

(c) paid in respect of any share, after a day appointed for payment of any call for money in respect thereof, until such call has been paid:

Or if call unpaid.

Provided that the directors may in their discretion, until the railway is completed and opened to the public, pay interest at any rate, not exceeding five per centum per annum, on all sums actually paid in cash in respect of the shares, from the respective days on which the same have been paid, and that such interest shall accrue and be paid at such times and places as the directors appoint for that purpose. R.S., c. 37, s. 133.

Proviso as to interest.

Compare 8 Vic., cap. 16, sec. 121 (Imp.).

The Act of 1903 first substituted the words "actually paid in cash" for the words "called up."

In the parliamentary committee attention was called to the difference between this section which permits interest to be paid out of capital during construction of the railway, on cash paid when due in respect of shares, and sec. 92 which expressly prohibits payment of interest out of capital on share subscriptions paid before they are due. Sec. 129 was said to be intended to encourage the building of the road out of capital instead of out of bond issues, but it does not seem possible to explain the difference on any sound principle.

130. No interest shall accrue to any shareholder in respect of any share upon which any call is in arrear, or in respect of any other share held by such shareholder while such call remains unpaid. R.S., c. 37, s. 134.

No interest if shareholder in arrears.

131. The directors may deduct, from any dividend payable to any shareholder, all or any such sum or sums of money as are due from him to the company on account of any call or otherwise. R.S., c. 37, s. 135.

Arrears deducted from dividend.

Bonds, Mortgages and Borrowing Powers.

132. (1) Subject to the provisions of this Act and of the Special Act, the directors of the company may, when thereunto authorised by the Special Act, issue bonds, debentures, perpetual or terminable debenture stock, or other securities, if duly empowered in that behalf by the shareholders, at any special meeting called for the purpose by notice in the manner provided by this Act, or at

Authorized.

Procedure.

any annual meeting in case like notice of intention to apply for such authority at such annual meeting has been given, at which meeting, whether annual or special, shareholders representing at least two-thirds in value of the subscribed stock of the company and who have paid all calls due thereon, are present in person, or represented by proxy.

Securities,
how execu-
ted.

(2) Such securities,—

Bonds.

(a) if in the form of bonds, may be signed by the president, or the vice-president or one of the vice-presidents, or a director, and countersigned by the secretary or an assistant or local secretary of the company; and any coupons attached to such bonds shall bear the signature of the treasurer or secretary of the company: Provided that the signature of the president on the bonds, and the signature of the treasurer or secretary on the coupons, may be engraved, lithographed or otherwise mechanically reproduced **facsimile** of such signatures respectively; and such reproduced and all other signatures of the officers aforesaid shall, for all purposes, be valid and binding upon the company, notwithstanding that at the date of the issue or certification of the bonds or coupons the persons whose signatures so appear are not the president, vice-president, director, treasurer, secretary, or assistant or local secretary, of the company as the case may be;

Debenture
stock.

(b) if in the form of debenture stock, may be signed in the same way as herein provided for the signature of bonds, or may be signed by the secretary or an assistant or local secretary of the company and countersigned by the registrar or an assistant or local registrar of the stock for the time being, or such other officers as the directors may designate;

Other
securities.

(c) if in any form other than bonds or debenture stock, may be signed in the same way as herein provided for the signature of bonds.

When and
where
payable.

(3) Such securities may be made payable at such times and in such manner and at such place or places in

Canada or elsewhere, and may bear such rate of interest, not exceeding six per centum per annum, as the directors think proper. Interest.

(4) The directors may, for the purpose of raising money for prosecuting the undertaking, issue, and sell or pledge, all or any of the said securities, at the best price, and upon the best terms and conditions, which at the time they may be able to obtain. Terms of sale.

(5) The power of issuing securities conferred upon the company by this Act, or under the Special Act, shall not be construed as being exhausted by any issue, and such power may be exercised from time to time: Provided that the limit to the amount of securities fixed in the Special Act shall not be exceeded. R.S., c. 37, s. 136; 1907, c. 38, s. 8. Am. Extent of borrowing power.

In the Act of 1906, sub-section 2 was as follows:

“2. Such securities shall be signed by the president or other presiding officer and countersigned by the secretary, or an assistant secretary, and such counter-signature, and the signature to the coupons attached to such securities, may be engraved.”

Sub-section 3 in the Act of 1906 had “five per centum” instead of “six per centum.” This is a return to the rate authorised before 1903. Compare secs. 100 and 129 and notes.

The Act of 1906 had in this section, a sub-section providing that: “No such security shall be for a less sum than one hundred dollars.”

Compare 8 Vict., cap. 16, sec. 38 (Imp.).

Difference from former Acts. Under sec. 93 of sub-sec. 1 of the Railway Act of 1888, a railway company could only borrow after the shareholders had authorised the loan at a special general meeting; but by the present section authority may be obtained at an annual meeting as well if due notice is given and two-thirds in value of the shares are represented. As to the nature of the notice required, see secs. 105 and 106, *ante*.

Power to Create Debts. Unless it flows as a matter of necessary inference from the objects for which a company is incorporated that it must borrow money, it has no power to do so without express statutory authority: **Ashbury v. Riche**, L.R. 9, Ex. 224, 249; 7 H.L. 653, with which compare **Colman v. Eastern Counties Ry. Co.**, 10 Beav. 1;

Brimelow v. Murray, 9 App. Cas. 519; **Cunliffe v. Blackburn**, 9 App. Cas. 857; **Chambers v. Manchester, etc., Ry. Co.**, 5 B. & S. 588. But it might, perhaps, create a charge upon its lands for the purposes of its undertaking; though where Parliament has prescribed the manner and extent of its borrowing powers it cannot borrow in any other way, and where it attempts to do so its securities will be void: **Baroness Wenlock v. River Dee Company**, 10 App. Cas. 354. It has been held in Canada, however, that a railway company has a general power to create a lien upon its property in favor of persons doing work for it which is in furtherance of the purposes for which it was incorporated: **Bickford v. Grand Junction Ry. Co.**, 23 Gr. 302, 1 S.C.R. 696; **Charlebois v. G.N.W. Central Ry. Co.**, 9 Man, L.R. 1. A company may also validly sell its rolling stock and at the same time agree with the purchaser to retain possession of it and to re-purchase it by re-paying the amount of the purchase money with interest within a limited number of years, and this cannot be impeached on the ground that it is a loan: **Yorkshire, etc., Co. v. McClure**, 21 Ch. D. 309; and see **North Central, etc Co., v. Manchester, etc., Ry. Co.**, 35 Ch. D. 191, 13 App. Cas. 554. And a company has a general power to incur debts in the ordinary course of its business and it may, if there are valid debts, acknowledge this indebtedness; and in England, where such a practice is in vogue, issue Lloyd's bonds to secure the amount. **White v. Carmarthen Ry. Co.**, 1 H. & M. 786; **Fontaine v. Carmarthen Ry. Co.**, 5 Eq. 316, 325. And it may also give a specific charge on money due it as security for a valid debt: **Pickering v. Ilfracombe Ry. Co.**, L.R. 3, C.P. 235; **Gardner v. London, etc., Ry. Co.**, 2 Ch. App. 201; and it may assign its rolling stock by way of security: **Blackmore v. Yates**, L.R. 2 Ex. 225. A person who lends money to a company for the purpose of paying its debts, whether due or subsequently incurred, has a valid claim against it to the extent to which his loan has been so applied: **Browne & Theobald**, 4th Ed., p. 79; **Re Cork, etc., Ry. Co.**, 4 Ch. App. 748; **Ulster Ry. Co. v. Banbridge, etc., Ry. Co.**, Ir. R. 2 Eq. 190; **Blackburn v. Cunliffe**, 22 Ch. D. 61, 9 A.C. 857; but the burden of showing that the money so lent has been applied in payment of debts lies on the claimant: **Blackburn v. Cunliffe**, *supra*. And the lands of a company may remain liable by way of vendors' lien for the amount of unpaid purchase money due in respect of them: **Peto v. Welland Ry. Co.**, 9 Gr. 455; **Patterson v. Buffalo, etc., Ry. Co.**, 17 Gr. 521; **Lincoln v. St. Catharines, etc., Ry. Co.**, 19 O.R. 106; and the same rule exists in England: **Walker v. Ware, etc., Ry. Co.**, L.R. 1 Eq. 195;

Bishop of Winchester v. Mid-Hants Ry. Co., L.R. 5 Eq. 17; **Pell v. Northampton, etc., Ry. Co.**, L.R. 2 Ch. 100; and in Quebec, **Clearihue v. St. Lawrence, etc., Ry. Co.**, Q.R. 9, S.C. 399; and the same lien will exist in favour of the vendor of personal property where it is expressly provided for: **Bickford v. Grand Junction Ry. Co.**, 23 Gr. 302, 1 S.C.R. 696; **Charlebois v. G.N.W. Central Ry. Co.**, 9 Man. L.R. 1; but it may be lost (at least as to personal property) by a subsequent valid mortgage made by the company: **Wallbridge v. Farwell**, 18 S.C.R. 1, at p. 18; and so according to the last case a vendor of rolling stock may lose his lien where he sells to a company which has already mortgaged its immovables because rolling stock becomes an immovable upon being put into operation by a railway company. See also **Barker v. Central Vermont Ry. Co.**, Q.R. 14 S.C. 467; affirmed on review November 3rd, 1899.

Enforcing security by sale of railway. A sale of the railway as a going concern could not be made under execution because it would break up the undertaking, and this was not contemplated by the statute; and, therefore, an execution would not operate as a charge on the whole railway, and a creditor's only remedy was for the appointment of a receiver: **Galt v. Erie, etc., Ry. Co.**, 14 Gr. 499, 15 Gr. 637; **Toronto General Trusts v. Central Ontario R.W. Co.**, 8 O.L.R. 342, 4 C.R.C. 328, and see **Phelps v. St. Catharines, etc., Ry. Co.**, 19 O.R. 501. But a judgment creditor might seize whatever property would not interfere with the railway as an undertaking and which was not specifically mortgaged; and before bondholders took over a railway mortgaged to them such judgment creditor was allowed to attach moneys belonging to the company: **Phelps v. St. Catharines, etc., Ry. Co.**, *supra*, reversing 18 O.R. 581.

It was afterwards enacted, however, by 46 Vict., ch. 24 (D), now incorporated as sec. 150, as amended by 6 & 7 Edw. VII., cap. 38, sec. 9, *infra*, that if a railway was sold by bondholders or under any other lawful proceeding and purchased by any person not having corporate power to hold and operate it, the purchaser should not operate it without authority from the Minister, and the courts began to construe this as meaning that the old rule that the whole undertaking could not be sold under execution or a charge upon the undertaking created in favor of an execution creditor was changed. They decided that an execution might thereupon create a valid charge and the execution creditor might validly proceed

to a sale: **Redfield v. Wickham**, 13 App. Cas. 467. This was decided upon appeal from Quebec and apparently it was always the law there that a railway might be seized under execution and sold: **Morrison v. G.T.R.**, 5 L.C.J. 313; **Drummond v. South Eastern Ry. Co.**, 22 L.C.J. 25; 24 L.C.J. 276; **Hochelaga Bank v. Montreal, etc., Ry. Co.**, 4 L.N. 332; **Ontario Car Co. v. Quebec Central Ry. Co.**, 10 L.N. 12; Abbott on Railways 102; and a seizure under execution has been allowed though a railroad was subsidised by the Government: **Wason v. Levis, etc., Ry. Co.**, 7 Q.L.R. 330. But the railway would have to be sold as a whole: **Stephen v. Banque d'Hochelaga**, M.L.R. 2 Q. B. 491; or such a part of it as would in itself form an integer: **Redfield v. Wickham**, *supra*; and see **Grey v. Manitoba, etc., Ry. Co.**, 11 M.L.R. 42; (1897), A.C. 254; the result of this amendment in the law, taken with the decision of the Privy Council in **Redfield v. Wickham** leads to the conclusion that the execution would now operate as a charge upon a railway in all provinces and that a railway might be sold under it, subject, of course, to prior existing encumbrances.

And it has been decided by the Privy Council in **Central Ontario Railway v. Trusts & Guarantee Co.** [1905] A.C. 576; 4 C.R.C. 340, that in the case of a Dominion Railway payment of the security may be enforced by sale.

While this case of the **Toronto General Trusts v. Central Ontario** was being litigated, the Dominion House passed 3 Edward VII., cap. 21, now R.S.C., chap. 140, secs. 26-29, providing that the Exchequer Court should have power to order the sale of a railway or section of a railway situate partly in one province and partly in another or otherwise subject to the legislative authority of the Dominion and further should have power to appoint a Receiver.

The pending litigation in respect to the Central Ontario was expressly excepted from the provisions of the Act, but, as above stated, it was afterwards decided that the security could be enforced by sale.

The intention seems to have been to make the jurisdiction conferred on the Exchequer Court by this Act concurrent with that possessed by any provincial court, though section 28 of R.S.O., c. 140, which purports to deal with this question, is not as clear as it might be.

See also, as to enforcement of security by sale, notes to sections 136 and 150.

Lien Created by Judgment. Where a company having no power to grant a lien to secure money which it had agreed to pay, consented to a judgment creating such a lien but the question of **ultra vires** was not argued or discussed, the lien created by such a judgment was held invalid: **G.N.W. Central R.W. Co. v. Charlebois** [1899], A.C. 114. But it seems to follow from this judgment that if the question of **ultra vires** had been fairly raised and decided in favour of the lien it would be valid: **Ibid.** See also S.C. 26 S.C.R. 221, **Re South America and Mexican Co.** [1895], 1 Ch. 37; **Nashville Ry. Co. v. United States**, 113 U.S.R. 261; **United States v. Parker**, 120 U.S.R. 89.

Compliance With Statutory Regulations. The provision requiring the consent of a general meeting of the shareholders is directory only and does not invalidate securities issued without such authority, even in the hands of the original allottee of the bonds if he has no notice of any such irregularity: **Fontaine v. Carmarthen R.W. Co.**, L.R. 5 Eq. 316.

See **Veilleux v. Atlantic Ry. Co.**, 12 C.R.C. 91; Q.R. 39 S.C. 127, for a discussion of the respective rights of creditors and bondholders where bonds were irregularly issued without regard to restrictions contained in the Special Act; and of conflict between Dominion railway legislation and provincial legislation respecting property and civil rights.

"Raising Money." This term should be liberally construed to enable a railway company to acquire funds for its undertakings: **Winnipeg, etc., R.W. Co. v. Mann**, 7 Man. L.R. 81; **Regent's Canal, etc., Co.**, 3 Ch. D. 43.

The provision contained in sub-sec. 5 is important for in the absence of some such provision a company having once issued bonds even if only by way of loan cannot after they are paid off re-issue them, the first issue exhausts the power, after which the bonds are "dead and gone" for all purposes. **Re Tasker & Sons** [1905], 2 Ch. 587. **In re George Routledge & Sons** (1904), 2 Ch. 474. And the deposit with a bank as security for a temporary loan, of bonds sealed in blank without name or date is an issue which exhausts the power and prevents a re-issue. **Re Perth Electric Tramways** [1906], 2 Ch. 216, and the fact that the bank does not hand back the debentures to the company will not give the right to re-charge them with a further amount after the first loan has been paid off. **In re Russian Petroleum, etc., Co., Ltd.** (1907), 2 Ch. 540.

As a result of these decisions legislation was passed in England giving the right under certain conditions to re-issue debentures and keep them alive when they have been paid off. And see sec. 133, next following.

Securities
pledged for
loans or
advances

133. (1) When securities issued under the last preceding section have been deposited or pledged by the company, as security for a loan or for advances made to it, and such loan or advances have been paid off and such deposit or pledge redeemed, such securities shall not be deemed to have been paid off or to have become extinguished, but shall be deemed to be still alive, and the company may re-issue them; or may cancel them and issue other securities in lieu thereof. In such event the person to whom such issue or re-issue is made shall have the same rights and priorities as if the securities had not previously been issued.

As first enacted in 1909, the latter part of this subsection read: "and the company may re-issue them; and upon such re-issue the person to whom the re-issue is made shall have the same rights and priorities as if the securities had not previously been issued." This did not provide for cancellation of original securities and issue of others in lieu of them.

When not
deemed
paid off.

(2) Where a company has deposited any of its securities to secure advances from time to time on current account, such securities shall not be deemed to have been paid off or extinguished by reason only of the account of the company ceasing to be in debit while the securities remain so deposited.

Reissue not
a new
security.

(3) The issue or re-issue of a security under this section shall not be treated as the issue of a new security for the purpose of any provision limiting the number or amount of the securities to be issued.

The words "issue or" are new. See note to sub-sec. (1).

To be
retroactive

(4) This section shall be retrospective in its operation, and shall apply to securities heretofore as well as to securities hereafter issued, deposited or pledged, and to past as well as to future transactions relating to or affecting the same, but nothing therein shall prejudice,—

(a) the operation of any judgment or order of a

court of competent jurisdiction pronounced or made in any legal proceedings which were pending on the nineteenth day of May, nineteen hundred and nine, as between the parties to the proceedings, in which judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this section had not been enacted.

Pending proceedings not affected.

This section was originally enacted on 19th May, 1919.

(b) any power to issue securities in the place of any securities paid off, or otherwise satisfied or extinguished, reserved to a company by the securities themselves, or by any mortgage or trust deed securing them. 1909, c. 32, s. 2.

Issue of securities in place of those paid off.

See 7 Edw. VII., c. 50, sec. 15 (Imp.), and sec. 104 of the English Companies Act of 1908; and *in re New London, etc., Co.* (1908), 1 Ch. 621; *Fitzgerald v. Persse*, 1908, 1 Ir., 279.

134. No power to issue or dispose of any such securities conferred by any Special Act of a provincial legislature shall, if such railway is thereafter brought under the legislative authority of the Parliament of Canada, be subsequently exercised without the sanction of the Governor in Council. R.S., c. 37, s. 137.

Provincial railways.

This provision was inserted for the first time in the Act of 1903 and makes the issue of bonds under any provincial Special Act of incorporation dependent not only upon the terms of the Special Act, but also upon permission being given by the Governor in Council. From the language of Osler, J.A., in *Bowen v. Canada Southern Ry. Co.*, 14 A.R. 1, at page 10, as follows:—"As to their main line and Welland and other branches they were incorporated by Ontario Acts, and although they are now subject to Dominion legislation alone, having been declared to be a work for the general advantage of Canada, I do not concede that the provisions of their Special Acts are thereby necessarily superseded;" it would appear that without some such express enactment the bonding privileges given by the special provincial act might have been exercised without supervision by the Dominion Government but for the express terms of this proviso.

And see *Connolly v. Montreal Park and Island Ry. Co.* Q.R. 22 S.C. 322.

Mortgage
deeds of
trust.

135. (1) The company may secure such securities by one or more deeds of trust by way of mortgage or charge creating such mortgages, charges and encumbrances upon the whole of such property, assets, rents and revenues of the company, present or future, or both, as are described therein: Provided that such property, assets, rents and revenues shall be subject, in the first instance, to the payment of any penalty then or thereafter imposed upon the company for non-compliance with the requirements of this Act, and next, to the payment of the working expenditure of the railway.

Powers
which may
be granted
in mortgage.

(2) By such a mortgage deed the company may grant to the holders of such securities or the trustee or trustees named in such mortgage deed all and every the powers, rights and remedies granted by this Act in respect of the said securities, and all other powers, rights and remedies, not inconsistent with this Act, or may restrict the said holders, or trustee or trustees, in the exercise of any power, privilege or remedy granted by this Act, as the case may be; and all the powers, rights and remedies, so provided for in such mortgage deed, shall be valid and binding and available to the said holders and trustee or trustees in manner and form as therein provided. R.S., c. 37, s. 138. Am.

Compare 8 Vict., cap. 16, sec. 42 (Imp.).

The Act of 1906 had at the beginning of sub-sec. 1: "The company may secure such securities by a mortgage deed creating such mortgages, etc." Sub-sec. 2 in the Act of 1906 read:

" 2. By the said mortgage, the company may grant to the holders of such securities, or the trustees named in such mortgage, all and every the powers, rights and remedies granted by this Act in respect of the said securities, and all other powers, rights and remedies, not inconsistent with this Act, or may restrict the said holders in the exercise of any power, privilege or remedy granted by this Act, as the case may be; and all the powers, rights and remedies, so provided for in such mortgage, shall be valid and binding and available to the said holders in manner and form as therein provided."

Sub-section (1) is taken with some unimportant variations from 51 Vict., cap. 29, sec. 94 (1). Formerly the "rents and revenues" only were to be subject to the pay-

ment of penalties; now the "property and assets, rents and revenues, present or future, or both," are expressly made liable. This appears to include unpaid calls. **Newton v. Debenture Holders, etc., Co.** (1895), A.C. 244. It is expressly provided that a mortgage may be made of property which the company does not own at the date thereof, but the mortgage would, of course, have to include it by apt words.

See **Re Panama, etc., Co.**, 1870, L.R. 5 Ch. 318, by which the validity and effect of what is called a "floating charge" was finally recognized. A company can charge all its property present and future without interfering with the carrying on of the business. The assets can be dealt with in the ordinary course of business until the floating charge becomes crystallized by the intervention of the debenture holders in case of default, e.g., by appointment of a receiver. Till such an event the company under this form of security can deal with its assets in the ordinary course of business free from the charge. This does not mean, however, that there is no charge till the happening of such an event, only that it does not attach till then. See for full discussion of the subject, Palmer's *Precedents*, 1920 Ed., Pt. III, pp. 88, 89, 96, and cases there cited.

Where a mortgagor purchases property and gives a mortgage back for part of the purchase money, the deed and mortgage are regarded as one transaction and a general mortgage or lien upon all the company's property will not rank in priority to the mortgage for the purchase money: *White's Canadian Company Law*, 395; **United States v. New Orleans Ry. Co.**, 12 Wall (U.S.) 362, and in the United States a mechanic's lien upon property acquired after the mortgage has been given takes precedence of such mortgage though it expressly includes "after-acquired property:" **Williamson v. New Jersey, etc., Ry. Co.**, 26 N.J. (Eq.), 398; but in Ontario it has been decided that a mechanic's lien under the *Mechanic's Lien Act* has no greater right to priority than writs of execution and will not attach as against a mortgage previously given covering after-acquired property: **Breeze v. Midland Ry. Co.**, 26 Gr. 225; **King v. Alford**, 9 O.R. 643; and the same rule has been adopted in British Columbia, **Larsen v. Nelson, etc., Ry. Co.**, 4 B.C.R. 151; and see also **Wallbridge v. Farwell**, 18 S.C.R. 1.

A mechanic's lien being in any case a charge under a provincial act which is designed if it takes effect at all to change the ownership of property which is acquired for

railway purposes, it has been decided in the **Larsen Case** that it would not attach against any property of a railway which is subject to the jurisdiction of the Dominion of Canada, and see further on this the notes preceding sec. 5, *ante*.

Mortgage of Rolling Stock. Under Quebec law rolling stock becomes immovable and therefore realty by destination as soon as it is delivered to the railway company and put into operation by it: *Abbott on Railways*, 107; *Civil Code*, 379; and therefore the unpaid vendor of cars supplied loses his lien against a mortgagee of lands of a company: **Wallbridge v. Farwell**, 18 S.C.R., 1; **G.T.R. v. Eastern Townships Banks**, 10 L.C.J. 11; and the same result follows and the same rule applies in Ontario: **Kirkpatrick v. Cornwall, etc., Ry. Co.**, 2 O.L.R. 113, and in England **Re Liskeard, etc., Ry. Co.** (1903), 2 Ch. 681, where, however, rolling stock is the subject of an express enactment, 30 & 31 Vict., cap. 127, sec. 4.

Rails, Ties and Superstructure. When affixed to the land these become real estate and so would pass under a mortgage of the company's lands: **G.W. Ry. Co. v. Rouse**, 15 U.C.R. 168; which would therefore take priority over a vendor's lien: **Lanark v. Cameron**, 9 U.C.C.P. 109, or an execution: **Kirkpatrick v. Cornwall, etc., Ry. Co.**, *supra*. But where they are not incorporated with the rest of the railway property so as to become fixtures and as such part of the land the reverse is the rule: **Wyatt v. Levis, etc., Ry. Co.**, 6 Q.L.R. 213.

Mortgage on Revenues. While the company remains in possession of the road the right to apply enough of the income or any surplus income to operate the road cannot be questioned: *Abbott on Railways*, 106; **Gilman v. Illinois, etc., Co.**, 91 U.S. 603; and even though interest is in arrear the mortgagees cannot take possession of the earnings or claim priority over a creditor who has attached such earnings until a receiver of the property has been appointed or the property has in some other way been reduced into possession by them: **Phelps v. St. Catharines, etc., Ry. Co.**, 18 O.R. 581, 19 O.R. 501; **Swiney v. The Enniskillen, etc., Ry. Co.**, 2 Ir. R (C.L.) 338.

Property
excepted
from
mortgage.

136. (1) The company may except from the operation of any such mortgage any assets, property, rents or revenue of the company, and may declare and provide therein that such mortgage shall only apply to and affect certain sections or portions of the railway or property of the company.

(2) Where any such exception is made, the company shall in such mortgage deed expressly specify and describe, with sufficient particularity to identify the same, the assets, property, rents or revenue of the company, or the sections or portions of the railway not intended to be included therein or conveyed thereby. R.S., c. 37, s. 139.

Special
description.

This section was first introduced by the Act of 1903 where it appeared as sub-sec. 3 of sec. 112.

In Quebec it has been held that a portion of a railway could not be sold, but that it must be sold as a whole: **Stephen v. Hochelaga Bank**, M.L.R. 2, Q.B. 491; but it was subsequently decided in that province that section 278 of 51 Vict., cap. 29 (now re-enacted as sec. 150), has made a sale of part of a railway possible, provided that part could be treated as an integer and be successfully operated by itself as a railway: **Redfield v. Wickham** 13 A.C., at pp. 476 and 477; and on this ground it was held that a section of a railway might be validly mortgaged, yet where part of that section was in one province and part in another the courts of one province could not authorise the sale under such a mortgage even of that part within their jurisdiction: **Grey v. Manitoba, etc., Ry. Co.**, 11 Man. L.R. 42, (1897), A.C. 254. It became a question therefore whether the expression "sections or portions" in this new clause gave a right to mortgage a portion of a railway which is not an integer so that mortgagees may exercise their remedies against the portions described without regard to its effect upon the rest of the railway.

See now R.S.C., cap. 140, sub-secs. 26-29.

Where parts of the company's property or assets are by the trust deed expressly excepted from the operation of a mortgage the case of **Wickham v. New Brunswick, etc., Ry. Co.**, L.R. 1, P.C. 64, would probably govern and the proceeds of a sale of such excepted portions would also be free from the operation of the mortgage: **Ibid.**, p. 80.

137. Every such mortgage deed, and every assignment thereof, or other instrument in any way affecting such mortgage or security, shall be deposited in the office of the Secretary of State of Canada, and notice of such deposit shall forthwith be given in the **Canada Gazette**. R.S., c. 37, s. 140 (1).

Deposit
with Secre-
tary of
State.

Notice.

This section is derived from 51 Vic., c. 29, sec. 94, but is considerably altered by requiring that assignments of mortgages, as well as the mortgages themselves, shall be deposited in accordance with it. See notes on sec. 138, next succeeding, and see, as to priorities, sec. 140.

Other filing,
deposit or
registration
not neces-
sary.

138. Where the provisions of the last preceding section have been complied with, or where by any Act of the Parliament of Canada heretofore or hereafter passed, provision was or is made for the deposit in the office of the Secretary of State of Canada of any mortgage or mortgage deed given to secure the payment of bonds or other securities issued by the company and the provisions with regard to such deposit have been duly complied with, it is hereby declared and enacted that it was and is unnecessary for any purpose that such mortgage, or any assignment thereof, or any other instrument in any way affecting it, should have been or should be otherwise deposited, registered or filed under the provisions of any law respecting the deposit, registration or filing of instruments affecting real or personal property: Provided that if such Act expressly required or requires some additional or other deposit, registration or filing, nothing herein contained shall be taken or held to dispense therewith or to waive any non-compliance with such requirement. R.S., c. 37, s. 140 (2); 1907, c. 38, s. 2. Am.

Sec. 140 (2) of the Act of 1906 was as follows:

“ 2. Such mortgage deed or other instrument need not be registered under the provisions of any law respecting registration of instruments affecting real or personal property.”

This provision was not found in the Act of 1888. The section as it now stands, with the exception of the first dozen words, is taken from sec. 2 of 6 & 7 Edw. VII., (1907), c. 38, with the omission of an obsolete clause as to pending litigation. This and the preceding section are no doubt intended to provide a uniform method of registration for all mortgages of the real or personal property of railways which are subject to the jurisdiction of the Federal Government in place of the diverse laws upon that subject which exist in each of the provinces.

As to right of Parliament to enact this section, see **Royal Trust Co. v. Atlantic, etc., Ry. Co.**, 13 Ex. C.R., 42.

As to effect of deposit on priority see sec. 140.

139. A copy of any mortgage deed securing any bonds, debentures, or other securities issued under the authority of this Act and the Special Act, and of any assignment thereof, or other instrument in any way affecting such mortgage or security, deposited in the office of the Secretary of State of Canada, purporting to be certified to be a true copy by the Secretary of State, or by the Deputy Registrar General of Canada, shall be **prima facie** evidence of the original, without proof of the signature of such official. R.S., c. 37, s. 73. Am.

Instruments
deposited,
evidence of.

The words "purporting to be" have been inserted.

140. (1) Subject however to the payment of the penalties and the working expenditure of the railway as hereinbefore provided, the securities so authorised and the mortgage deeds respectively securing the same shall rank against the company, and upon the franchise, undertaking, tolls and income, rents and revenues, and the real and personal property thereof, according to the priorities, if any, established by such mortgage deeds.

Ranking of
securities.

(2) Each holder of the said securities shall be deemed to be a mortgagee or encumbrancee upon the mortgaged premises **pro rata** with all other holders of the same issue and in accordance with and having regard to the priorities, if any, so established; but no proceedings authorised by law, or by this Act, shall be taken to enforce payment of the said securities or of the interest thereon except through the trustee or trustees appointed by or under such mortgage deed or deeds. R.S., c. 37, ss. 141, 142. Am.

Holder a
mortgagee.

No
proceedings
except
through
trustee.

Compare 8 Vic., c. 16, secs. 42 and 44 (Imp.).

The words "as hereinbefore provided" are new. See sec. 135 (1).

The words "and to any lawful restriction or exception contained in the mortgage deed" followed the word "railway" in the corresponding section of 1906. They were struck out because the committee of the House found it "impossible to understand what that means."

The Act of 1906 had the words "to be issued" after "authorised" in sub-sec. 1.

After the word "thereof" in sub-sec. (1), the words "at any time acquired" have been struck out; and the

words "established by such mortgage deeds" have been inserted.

"Encumbrancee" is evidently a misprint for encumbrancer, which was the word used in the Act of 1906.

The words "of the same issue and in accordance with and having regard to the priorities, if any, so established," have been added after "holders." The words "or deeds" have been added at the end.

It is to be observed that there is no express provision that the holders under a mortgage deposited as required by section 137 shall take any priority over those who may claim under a prior mortgage not so deposited; nor is it provided that priority of deposit shall prevail as between deposited mortgages. Section 141 of the Act of 1906 provided that, subject as therein mentioned, "the securities so authorised to be issued shall be taken and considered to be the first preferential claim," but that section did not mention deposit; nor does section 140 (1) of the present Act, which differs from the former section in providing that "the securities so authorised and the mortgage deeds securing the same shall rank according to the priorities, if any, established by such mortgage deeds." This would probably be construed to mean that those who had complied with the terms of the statute by depositing their securities with the Secretary of State would take priority over those who did not. And it may be that, where there had been unnecessary delay in effecting registration, by which a subsequent encumbrancer had been misled, the later security though subsequent as to execution and perhaps also as to registration, might prevail. But it is "the priorities, if any, established by such mortgage deeds," that are to be regarded, and this language appears to favour priority of execution over priority of registration. It was stated before the Parliamentary Committee that these words were intended to remove the doubt "whether prior securities took precedence over subsequent ones." For a discussion of this subject under a somewhat similar provision in the Province of Quebec, see White's Canadian Company Law, pp. 379 to 386. Observe the different language of section 146 (as to contracts of conditional sale of rolling stock to a company), which expressly declares such contracts to be valid against all persons upon due execution and deposit with the Secretary of State.

Definitions. The word "franchise" is a wide term which has been defined to be a special privilege emanating from the Government by a legislative or royal grant:

Standard Dictionary "Franchise and License." See also **Re City of Toronto and Toronto Street Ry. Co.**, 22 O.R. 374, at p. 396, and 21 Can. L.T. 435.

The word "undertaking" is defined by sec. 2, sub-sec. (35), *ante*; and the word "toll" by sec. 2, sub-sec. (32), *ante*.

Priorities. Where bonds have been pledged to more than one person a question sometimes comes up as to which of one or more holders is entitled to the proceeds of the assets, on which they are secured, in priority to others also claiming in respect of them. Instances of questions of this character may be seen in **Nova Scotia Central Ry. Co., v. Halifax Banking Co.**, 23 N.S.R. 172, 21 S.C.R. 536; **Pratt v. Consolidated, etc., Co.**, 34 N.B.R. 23.

Where under the Special Act a railway is authorised to issue preferential bonds for raising money for the purpose of forwarding its undertaking it cannot pledge such bonds to a municipality as security for a bonus voted to it by the latter: **Eldon v. Toronto, etc., Ry. Co.**, 24 Gr. 396.

A statute incorporating a railway company provided that under certain conditions the railway company's charter should become forfeited and the property revert to the Crown; upon these conditions happening it was held that the security which had been mortgaged to the debenture holders under the terms of the mortgage deed had passed to the Crown by virtue of the breach of the conditions which were the subject of the forfeiture and the Crown took it freed from any liability to the debenture holders: **Coates v. The Queen** [1900], A.C. 217.

The holder of bonds pledged does not become a trustee of the property mortgaged on behalf of the company and there is nothing to prevent him from buying in the property upon a sale being validly made under the terms of the debentures or the agreement pledging the same with him: **Nova Scotia, etc., R.W. Co. v. Halifax Banking Co.**, 23 N.S.R. 172, 21 S.C.R. 536. The fact that bondholders are to share *pro rata* in the property mortgaged gave rise in a case of **Pratt v. Consolidated, etc., Co.**, 34 N.B.R. 23, to a peculiar situation. There was a fund in Court applicable to the payment of a proportion of the indebtedness due upon bonds issued by several companies which eventually amalgamated under the name of the defendant company. The latter issued its bonds in exchange for debentures of the companies that took it over,

and most of the old debenture holders made the exchange; bondholders to the extent of \$32,000, however, refused to exchange for the new debentures and claimed the whole of the moneys in court. It was held, however, that the other bonds had not been redeemed so as to reduce the total issue outstanding to \$32,000, and that they were not entitled, therefore, to the whole of the funds in court, but only to the proportion which their bonds bore to the total issue.

Rights of Bondholders. Notwithstanding the provision in this sub-section that the remedies given by the statute can be enforced by the trustee only, it is said that any bondholder might, in the interest of the class which he represents, bring an action to protect or realize the securities mortgaged where the trustee fails or refuses to act: Jones on Railroad Securities, sec. 362; Abbot on Railways, p. 120. But the contingencies upon which trustees are to act and the possible results of their refusing to act are generally expressly provided for by the deed of trust. In Quebec bondholders have, in the interest of their class, been allowed even before default to apply to restrain a company from proceeding illegally and in a manner that would depreciate the security: **Wyatt v. Senecal**, 4 Q.L.R. 76; and where a trustee has acted in collusion with the company to the prejudice of bondholders, an action by the latter to restrain illegal and prejudicial dealings with the property has been successful: **Murdock v. Woodson**, 2 Dill. 188; **Weetjen v. St. Paul, etc., Ry. Co.**, 4 Hun. 529.

It is not necessary in order to obtain the appointment of a Receiver that either principal or interest should be in arrear. All that is necessary is to show that the security is in jeopardy. Palmer's Precedents, Part III., 1920 Edition, pp. 489-490, and cases there cited. **Diehl v. Carritt**, Anglin, J., Oct. 27th, 1906 (not reported).

Position of Trustees. Trustees are not liable for goods supplied or debts contracted before they entered into possession: **Wallbridge v. Farwell**, 18 S.C.R. 1. But they become liable as common carriers to shippers of goods to the same extent that the railway itself would have been: **Daniels v. Hart**, 118 Mass. 543. They must protect the security they hold to the best of their ability: Jones' Railroad Securities, secs. 358, 362. They may not assent on behalf of the bondholders to other charges taking precedence over the claims of their *cestui que trust*; **Duncan v. Mobile, etc., Ry. Co.**, 2 Woods, 542; but bondholders may, with the consent of the majority of trustees, postpone their securities, though they cannot by

such consent postpone also the securities of such bondholders as do not assent: **Greene v. Ruggles**, 31 N.B.R. 679. Affirmed by the Privy Council 21 **Canada Gazette** 415. They can, as plaintiffs, bring an action to enforce their rights under the mortgage deed: **Hatherton v. Temiscouata R.W. Co.**, Q.R. 12, S.C. 481, and notice to them is notice to the bondholders: **Miller v. Rutland, etc., Ry. Co.**, 36 Vt. 452.

141. If the company makes default in paying the principal of or interest on any of such securities at the time when such principal or interest, by the terms of the securities, becomes due and payable, then at the next annual general meeting of the company, and at all subsequent meetings, all holders of such securities so being and remaining in default, shall, in respect thereof, subject to the provisions of the next following section, have and possess the same rights, privileges and qualifications for being elected directors, and for voting at general meetings, as would attach to them as shareholders, if they held fully paid-up shares of the company to a corresponding amount. R.S., c. 37, s. 143.

Default of company.

Rights of security holders.

142. (1) The rights given by the last preceding section shall not be exercised by any such holder, unless it is so provided by the mortgage deed, nor unless the security in respect of which he claims to exercise such rights has been registered in his name, in the same manner as the shares of the company are registered, at least ten days before he attempts to exercise the right of voting thereon.

Limitations affecting such rights.

(2) The company shall be bound on demand to register such securities, and thereafter any transfers thereof, in the same manner as shares or transfers of shares. R.S., c. 37, s. 144.

Registration.

143. The exercise of the rights, so given as provided by the last two preceding sections, shall not take away, limit or restrain any other of the rights or remedies to which the holders of the said securities are entitled under the provisions of such mortgage deed. R.S., c. 37, s. 145.

Other rights not affected.

There are no provisions similar to these in the English Act.

Bondholders' Right to Vote. It has been held under a similar section, 31 Vic. Ch. 40, sec. 2, (Ont.), but without the provision requiring fully paid-up shares to be held to a corresponding amount, that this section confers a general right upon bondholders to vote at the next annual meeting, provided the conditions imposed by it and by the trust deed, if any, are complied with: See **Montreal, etc., Ry. Co. v. Hochelaga Bank**, 27 L.C.J. 164. It does not in terms deprive bondholders of their power to vote or give any right to appoint directors against the will of the bondholders, unless the number of bonds represented at the meeting should outweigh the number of shares so represented: **Re Osler and Toronto, etc., Ry. Co.**, 8 P.R. 506; **Re Johnson & Toronto, etc., Ry. Co.**, *ibid.* 535; **Hendrie v. G.T.R.**, 2 O.R. 441; and bondholders represented at such a meeting have only one vote for each bond they hold. This was decided where each bond was for £100 and each share for \$50: **Bunting v. Laidlaw**, 8 P.R. 538.

If a company is shown to be unable to pay its interest the mere fact that interest coupons have not been presented at the time and place provided for payment will not deprive the holders of their right to register and vote: **Re Thomson & Victoria Ry. Co.**, 9 P.R. 119; and where debentures were to be handed to creditors in case of non-payment of money due for advances, the mere fact of default in payment of the advances entitled the creditors to register and vote in spite of the contention that the latter had not the absolute beneficial right in themselves, but were in fact only pledgees of the bonds with power to sell them: **Re Thomson & Victoria Ry. Co.**, 8 P.R. 423; and proof of a demand upon an assistant secretary who performed all the duties of secretary is sufficient to entitle a bondholder to compel registration: **Re Thomson & Victoria Ry. Co.**, 9 P.R. 119; the holders of bonds who desire to vote must be prepared to make out a *prima facie* transfer to themselves, but no special provision by by-law for their registration is necessary, and the mere fact that the bondholders were directors of the company is no objection to registration where there is nothing to show that they have not complied with all the formalities required by the statute: **Re Thomson & Victoria Ry. Co.**, *supra*: nor is it necessary for the holder of bonds payable to "bearer" to register the successive transfers to himself as is required by the Acts in the case of shares: **Re Osler & Toronto, etc., Ry. Co.**, 8 P.R. 506; but the bondholder himself must be registered as owner: **Re Johnson and Toronto, etc., Ry. Co.**, *ibid.* 535. Bondholders are not

confined to the right to vote for directors, but may vote on any business properly coming before an annual meeting, but apparently without express statutory authority (which does not appear in the above section), they cannot vote at a special meeting: **Hendrie v. G.T.R.**, 2 O.R. 441. This case also decides that where bondholders are given the right to vote at a meeting any action taken at that meeting without counting their vote will be invalid.

How Registration Enforced. Although the prerogative writ of mandamus is not in Ontario applicable as a remedy to enforce specific performance of what are in effect mere personal contracts, even though validated by statute (**Grand Junction R.W. Co. v. Peterborough**, 8 S.C.R., at pp. 121 *et seq.*), yet this has been held to be the appropriate method of enforcing registration under the Act: **Re Thomson & Victoria Ry. Co.**, 9 P.R. 119; **Re Osler & Toronto, etc., Ry. Co.**, 8 P.R. 506; **Re Johnson v. Toronto, etc., Ry. Co.**, *ibid.* 535. For a further discussion of this subject see 1 C.R.C. 295.

Presentation for Payment—Interest. Where a bond is made payable upon presentation at a particular time and place, presentation in accordance with the terms of the bond must be averred in an action upon it after default: **Osborne v. Preston, etc., Ry. Co.**, 9 U.C.C.P. 241. The case of **Fellowes v. Ottawa Gas Co.**, 19 U.C.C.P. 174, is not in accordance with this, but in the case of **Montreal City Bank v. Perth**, 32 U.C.C.P. 18, where both cases were considered, the decision in the earlier case was adopted. If, however, it can be shown that the company was unprepared to pay, even though presentation were regularly made, this formality will be dispensed with: **Re Thomson & Victoria Ry. Co.**, 9 P.R. 119; but where the company had funds at the place of payment, but the bond was not then nor for a long time afterwards presented for payment, it was decided that the fact of the bond never being in plaintiff's possession, but in the possession of defendant's solicitor at plaintiff's request was no excuse for failure to present when due and plaintiffs were not allowed interest upon the bond after default: **McDonald v. G.W. Ry. Co.**, 21 U.C.R. 223. In **McKenzie v. Montreal, etc., Ry. Co.**, 27 U.C.C.P. 224, the court refused to take judicial notice of what a "coupon" was, and refused to treat an assignment of a "coupon and all claims in respect thereof" as an assignment of a covenant by a company to pay interest upon a bond. Where bonds are made payable to bearer and coupons for interest are assigned by the bondholder to a purchaser for value without notice, the latter takes them freed from any equi-

ties existing between the company and the bondholder: **McKenzie v. Montreal, etc., Ry. Co.**, 29 U.C.C.P. 333. Where interest is due under a coupon the right to recover is only barred after twenty years: **Toronto General Trusts Corporation v. Central Ontario Ry. Co.**, 6 O.L.R. 534; 3 C.R.C. 339; **Central Ontario Ry. Co. v. Trusts & Guarantee Co.** [1905], A.C. 576, 4 C.R.C. 340.

Other Remedies—Receiver. Apart from the statutory right of voting and taking part in the management of the company after default or taking proceedings to sell the undertaking as already mentioned the usual remedy of bondholders is the appointment of a receiver. The cases in which the court will appoint a receiver of any company are enumerated in Abbott on Railways, 125 and 126 as follows:

1. At the suit of mortgagees or of bondholders who have a lien on the corporation property: **Furness v. Caterham Ry. Co.**, 25 Beav. 614; **Peto v. Welland Ry. Co.**, 9 Gr. 455.

2. At the suit of creditors who have obtained judgment which they cannot collect by execution: **Evans v. Coventry**, 5 D.M. & G. 911.

3. At the suit of any creditor or stockholder interested in the funds of the company where there is a breach of duty on the part of directors and a loss or threatened loss of funds: **Potts v. Warwick, etc., Co.**, Kay 142; **Whitworth v. Gaugain**, 3 Hare 416; **Ames v. Birkenhead Docks**, 20 Beav. 332; **Peto v. Welland Ry. Co.**, 9 Gr. 455.

4. Where a state of things exists in which the governing body are so divided that they cannot act together: **Featherston v. Cooke**, 16 Eq. 298; **Trade Auxiliary Co. v. Vickers**, *ibid.* 303.

5. Where a company has practically ceased to do business: **Warren v. Fake**, 8 Hare Pr. 430.

6. Where a company is dissolved and has no officer to attend to its affairs: **Hamilton v. Transit Co.**, 26 Barb. 46; **Murray v. Vanderbilt**, 39 Barb. 140; **Lawrence v. Greenwich, etc., Co.**, 1 Paige 586.

In Quebec the office of receiver is not recognized and there was some doubt whether a court had power to appoint a "sequestrator:" **Morrison v. G.T.R.**, 5 L.C.J., 313; but in **Lambe v. Montreal, etc., Ry. Co.**, (1891), (not reported), it was decided that a sequestrator might be appointed, and in Abbott on Railways, p. 126, it is contended that this view is a sound one.

In Ontario the practice of the English Courts is followed in reference to the appointment of a Receiver or Receiver and Manager: **Diehl v. Carritt**, Anglin, J., Oct. 27th, 1906 (not reported).

The law of Receivers in England is concisely set out in Palmer's Precedents, Part III., 1920 Edition, p. 488, *et seq.*

The distinction between a Receiver and Receiver and Manager is pointed out at p. 445, as follows:

"The appointment of a Receiver as distinguished from a Receiver and Manager does not impart any power to carry on business of the company. The duty of the Receiver is merely to take possession and protect the property over which he is appointed." **Manchester v. Midland R. Co.**, 14 Ch. D. 645, but if there is a going business comprised in the security the court has jurisdiction (except as regards statutory undertakings below mentioned) to appoint a Receiver and Manager, that is a Receiver to manage and carry on the business: **Peek v. Triusharan Co.**, 2 Ch. D. 115. The doubts of Kay, J., in **Makins v. Percy Ibotson & Sons** (1891), 1 Ch. 133, as to the propriety of appointing a manager were expressed in ignorance that the existence of the jurisdiction was attested by hundreds of decisions of the High Court and Court of Chancery made during the preceding twenty years.

Debenture and debenture stockholders in this respect stand in the same position as other mortgagees, and mortgagees when their security comprises, expressly or impliedly, a business, are entitled to the appointment of a Receiver and Manager. **Whitley v. Challis** (1892), 1 Ch. 64. **County of Gloucester Bank v. Rudrey, etc., Co.** [1895], 1 Ch. 629.

In the case of a statutory undertaking constituted by Act of Parliament or by provisional order, confirmed by Act of Parliament, and not assignable, the Court can appoint a receiver: **Gardner v. London, Chatham and Dover Ry. Co.**, 2 Ch. App. 201: but cannot even by consent appoint him manager: **Blaker v. Herts, etc., Ry. Co.**, 41, Ch. D. 399; **Marshall v. South Staffordshire Trams**, (1895), 2 Ch. 36; **Pegge v. Neath Tramways Co.**, 1895, 2 Ch. 508. Palmer's Precedents, 1920 Ed., Pt. 3, pp. 490 to 493. These decisions were grounded on that in **Gardner v. L.C. & D. Ry. Co.**, 2 Ch. App. 201. The author cited goes on to shew that the basis of that decision was that the Court only undertook the management of a business with

a view to the winding up and sale of the business and that as the corporations in question in the above cases could not be sold, no manager would be appointed. Obviously this reason does not apply when the Court has jurisdiction to sell the undertaking. In England power is expressly given by 30 & 31 Vict., cap. 127, sec. 4, to appoint a manager.

In **Diehl v. Carritt, supra**, it was held that the Ontario Courts had jurisdiction to appoint a receiver and manager at the instance of the debenture holders of a pulp and paper mill.

In **Galt, v. Erie, etc., Ry. Co.**, 14 Gr. 499, a receiver and manager was appointed by an Ontario Court.

In **Allan v. Manitoba, etc., Ry. Co.**, 10 Man. L.R. 106, a Court thought that **Gardiner v. L.C. & D. Ry.** was still applicable notwithstanding that a railway can be sold and held that a mortgagee was not entitled to the appointment of a manager; see p. 115 of the report. But as above stated, this reasoning is not applicable where there is power as there now is to sell the railway; R.S.C., c. 140, sec. 26, and see sec. 150 and **Sage v. Shore Line Ry.**, 2 N.B. Eq. 321, 2 C.R.C. 271; **Ritchie v. Central Ont. Ry.**, 7 O.L.R. 727.

A receiver or receiver and manager is personally responsible on his contracts made as a receiver or manager but is entitled to be indemnified out of the estate. His creditors are entitled to be subrogated to his rights against the assets. He may, however, expressly contract that he will not be personally liable.

A receiver or receiver and manager is entitled to be indemnified out of the estate only for debts properly incurred and if, e.g., the Court has given him a limited borrowing power and he exceeds it he may or may not be entitled to indemnity.

Palmer's Precedents, Pt. III., 1920 Ed., p. 497-498-499, **British Power, etc., Co.**, (1906), 1 Ch. 497, (1907), 1 Ch. 528, **Burt v. Bull**, 1895, 1 Q.B. 276, **Strapp v. Bull**, 1895, 2 Ch. 1 and other cases there cited.

A receiver and manager of a company coming under the jurisdiction of this Act would have in the first place to pay the working expenditures as defined by sec. 2, ss. 36, and would also be entitled to pay other necessary outgoings, if any.

Charlebois v. Gt. N.W. Central Ry., 11 Man. L.R. 135, might seem to be an authority to the contrary, but in the

Charlebois case the receiver appears to have been a receiver simply, though described as receiver and manager. There were also other facts in this case to distinguish it.

The receiver cannot pay debts incurred prior to his appointment because these would be debts of the Company and not of the receivership, but it was held in **Gooderham v. Toronto & Nipissing Ry. Co.**, 8 A.R. (Ont.) 685, that debts for working expenditures incurred before the date of the receivership but not payable in the ordinary course till after, were payable by the receiver.

Creditors, however, who have claims for working expenditures entitled to priority may still claim on the moneys paid by the receiver into Court, *ibid*, p. 694.

The lien for working expenditure now covers property and assets as well as rents and revenues of the Company, see sec. 2 (36). In **Burnhill v. Hampton, etc., Ry. Co.**, 3 N.B. Eq. 371, this provision was held not to be retroactive.

Nothing in the nature of speculative expenditure will be authorised by the Court and only in exceptional cases will the Court authorise an expenditure for the completion or extension of a railway. **Ritchie v. Central Ont., Ry. Co.**, 7 O.L.R. 727.

See **Wile v. Bruce Mines Ry.**, 11 O.L.R. 200, as to power to appoint a receiver whether railway is under Provincial or Federal jurisdiction in the absence of legislation to the contrary.

If a receiver and manager is appointed, the Company, while it still subsists, necessarily loses control. By the appointment of a receiver the management of the road is not necessarily interfered with, but is still left to the directors subject to the right of the receiver to watch the expenses: **Lee v. Victoria Ry. Co.**, 29 Gr. 110, and to remonstrate when in his opinion they are needless and excessive, or if necessary apply to the court to have improper expenditures stopped: **Simpson v. Ottawa, etc., Ry. Co.**, U.C.L.J. (O.S.) 108. A receiver should pay out of the moneys coming to him the expenses of the undertaking, the interest of the mortgagees and the balance into court: **Ames v. Birkenhead Docks**, 20 Beav. 332, subject, however, to the payment of penalties provided for by this Act: **Ante**, sec. 135. Where a line is not open for public traffic and there is not and is not likely to be any money for a receiver to receive, one ought not to be appointed even though there may be jurisdiction to do so, which is doubtful: **Re Knott End Railway Act 1898** (1901) 2 Ch. 8.

When a receiver is appointed and put in control of the road the indebtedness which he incurs in the necessary operation and maintenance of the road is described as "working expenditure." This term is defined by section 2 (36), *ante*, and includes wages (*Allan v. Manitoba, etc., Ry. Co.*, 13 C.L.T. 349), necessary repairs, (*Sage v. Shore Line Ry. Co.*, 2 C.R.C. 271), but does not include all expenses of operation and management incurred by the Company apart from and outside of the receivership: *Charlebois v. Great, etc., Ry. Co.*, 11 Man. L.R. 315; nor in England cost of defending an action to establish claims prior to the receivership: *Re Wrexham, etc., Ry. Co.* (1900), 1 Ch. 261, 1900, 2 Ch. 436. The *Charlebois* decision, however, was based on a particular order, not on the wording of the statute.

Transfer by
delivery.

144. (1) All such securities may be made payable to bearer, and shall, in that case, be transferable by delivery until registration thereof, as hereinbefore provided.

Or writing
if registered.

(2) While so registered, they shall be transferable by written transfers, registered in the manner prescribed in the mortgage deed or deeds. R.S., c. 37, s. 146. Am.

In the Act of 1906, the last clause of sub-sec. 2, read: "registered in the same manner as in the case of the transfer of shares."

Compare 8 Vict., cap. 16, secs. 45 and 47 (Imp.).

Power to
borrow by
overdraft,
etc.

145. (1) The company may, for the purposes of the undertaking, borrow money by overdraft or upon promissory note, warehouse receipt, bill of exchange, or otherwise upon the credit of the company, and become party to promissory notes and bills of exchange.

Note or bill
of company,
how made.

(2) Every such note or bill made, drawn, accepted or endorsed by the president or vice-president or one of the vice-presidents of the company, or other officer authorised by the by-laws of the company or by resolution of the directors, and countersigned by the secretary, or assistant or local secretary, or treasurer of the company, shall be binding on the company, and shall be presumed to have been made, drawn, accepted or endorsed with proper authority, until the contrary is shown.

No seal
necessary.

(3) It shall not be necessary in any case to have the seal of the company affixed to any such promissory note or bill of exchange.

(4) Nothing in this section shall be construed to authorise the company to issue any note or bill payable to bearer, or intended to be circulated as money, or as the note or bill of a bank.

No bill payable to bearer.

(5) Neither the president, vice-president or secretary, nor any other officer of the company so authorised as aforesaid, shall be individually responsible for any such promissory note or bill of exchange made, drawn, accepted or endorsed, or countersigned by him, unless such promissory note or bill of exchange has been issued without proper authority. R.S., c. 37, ss. 147, 148. Am.

Officers not personally liable.

In the Act of 1906, sub-sec. (2) read as follows:

"2. Every such note or bill made, drawn, accepted or endorsed by the president or vice-president of the company, or other officer authorised by the by-laws of the company, and countersigned by the secretary of the company, shall be binding on the company, and shall be presumed to have been made, drawn, accepted or endorsed with proper authority, until the contrary is shown."

The power to borrow by overdraft was first given by the Act of 1903.

As the section now stands a railway is enabled to borrow money not only by promissory notes and bonds but by almost any method now known in finance. In England where a similar power to make notes is not expressly given it has been laid down that it will only be implied where a company cannot do business without it, and in the case of railway companies it will not be inferred from a mere power to incur debts: **Bateman v. Mid Wales Ry. Co.**, L.R. 1, C.P. 499; but see **Re Peruvian Ry. Co.**, L.R. 2, Ch. 617. Before express power to make notes was given the same rule was laid down in Ontario: **Topping v. Buffalo, etc., Ry. Co.**, 6 U.C.C.P. 141; but sometimes such power was conferred by the company's special act: **Kingston, etc., Ry. Co. v. Gunn**, 3 U.C.R. 368. Debentures or coupons would not be treated as promissory notes where the company had no power to give such notes: **Geddes v. Toronto Street Ry. Co.**, 14 U.C.C.P. 513; where power is given to certain officers to make notes a note purporting to be made by the company but not signed by the persons authorised by statute or by-law is invalid: **Mechanics Bank v. Bramley**, 25 L.C.J. 256; **Jones v. Eastern Townships, etc., Co.**, M.L.R. 3 S.C. 413; and where the secretary of a company had power to make notes, but instead indorsed one for the accommodation

of another, it was held that a person who took the note with knowledge of the circumstances could not recover from the company: **Union Bank v. Eureka, etc., Co.**, 33 N.S.R. 302; but in Quebec this defence would not be open to an indorser of a note made by a company who was himself being sued by another: **Ball v. Atlantic, etc., Ry. Co.**, 3 Que. P.R. 315. For a general discussion of this subject see **Bridgewater Cheese Co. v. Murphy**, 23 A.R. 66, 26 S.C.R. 443.

It was stated during the discussion of sub-sec. 4, by the parliamentary committee that this sub-sec. was not intended to prevent the issue by a railway company of short-date notes payable to bearer, but to prevent it from acting as a bank and issuing paper which could be used as currency; but the prohibition appears to be absolute.

Contracts Respecting Rolling Stock.

Deposit of
contract
evidencing
lease, etc.,
of rolling
stock.

146. (1) Any contract evidencing the lease, conditional sale or bailment of rolling stock to a company shall be in writing, duly executed by the parties thereto, and the same or a copy thereof may be deposited in the office of the Secretary of State of Canada, within twenty-one days from the execution thereof, and no contract so deposited need be otherwise deposited, registered or filed under the provisions of any law respecting the deposit, registration or filing of instruments affecting real or personal property, and upon the due execution and deposit of any such lease, conditional sale or bailment of rolling stock as aforesaid, the same shall be valid against all persons.

Notice of
deposit.

(2) Notice of such deposit shall forthwith thereafter be given in the **Canada Gazette**. 1907, c. 38, s. 4. Am.

The words "against all persons" have been added at the end of sub-section (1). Under this section, a contract of lease, conditional sale or bailment of rolling stock to a company may (not "shall") be deposited with the Secretary of State and is to be valid against all persons upon such deposit. A contract deposited under this section would take priority over another, not deposited, though the latter was registered in accordance with provincial law. But deposit is not made essential to the validity of such a contract; and it is only in case of such deposit being made that registration under any provincial or other law is made unnecessary. Provincial legislation

is therefore not wholly superseded and it is submitted, first, that such contracts, though not deposited hereunder, would be valid within a province if duly registered according to provincial laws making them valid upon such registration (except, of course, as against instruments deposited under this section); and second, that where provincial laws made registration of such contracts necessary to their validity, or declared them void if not registered, failure to register under the provincial law would render them invalid, unless they were deposited in accordance with this section.

As to effect of Dominion on provincial legislation of this nature see notes preceding section 5 and cases there cited.

Purchase of Railway Securities.

147. Except as in this Act or the Special Act otherwise provided, no company shall either directly or indirectly, employ any of its funds in the purchase of its own stock, or in the acquisition of any shares, bonds or other securities, issued by any other railway company, or in the purchase or acquisition of any interest in any such stock, shares, bonds or other securities. R.S., c. 37, s. 149. Am.

Company not
to purchase
railway
stock.

Instead of the introductory clause: "Except as in this Act or the Special Act otherwise provided," the Act of 1906 had a proviso as follows:

"Provided that nothing in this section shall affect the powers or rights which any company in Canada had or possessed on the first day of February, one thousand nine hundred and four, by virtue of any Special Act, to acquire, have or hold shares, bonds, or other securities of any railway company in Canada or the United States."

The Act of 1906 had the words "in Canada" after "railway company."

Section 394 provides a penalty of \$1,000 for infraction of this section, and the acquisition of each share, bond, security or interest is to be deemed a separate violation of it.

When one railway company acquires control of another by purchase of its stock, the two railways will be treated as one for the purpose of rate regulation: **Wylie Milling Co. v. C.P.R. Co.**, 14 C.R.C., 5. See also **Dawson Board of Trade v. White Pass Ry. Co.**, 9 C.R.C. 190, cited in notes to sec. 33.

Disposing of Lands obtained as Subsidy, etc.

Company
may dispose
of lands
acquired
from Crown.

148. (1) Any company which has obtained from the Crown, by way of subsidy or otherwise, in respect of the construction or operation of its railway, a right to any land or to an interest in land, has, and from the time of obtaining such right has had, as incident to the exercise of its corporate powers, authority to acquire, sell or otherwise dispose of the same or any part thereof.

May convey
right to
another
company.

(2) Such company may convey such right or interest, or any part thereof, to any other company which has entered into any undertaking for the construction or operation, in whole or in part, of the railway in respect of which such land or interest in land was given; and thereafter such other company shall have, in respect of such land or interest in land, the same authority as that of the company which has so conveyed it. R.S., c. 37, s. 152.

Sub-sec. 1 appears to be intended to make it clear that subsidy lands are not like, e.g., the right-of-way or other essential parts of a railway which cannot be alienated; and sub-sec. 2 provides that the company may pay its contractors by conveyance of its subsidy lands, or rights thereto, instead of in cash.

Lands given
to company
by any
person.

149. If any lands have been given to the company by any corporation or person, as aid towards, or as consideration in whole or in part for the construction or operation of the company's railway, either generally or with respect to the adoption of any particular route, or on any other account, the authority of the company, and of any other company to which it may convey its right in any of the said lands, shall be the same as if such lands had been obtained by the company from the Crown as aforesaid. R.S., c. 37, s. 153.

Section 148 was enacted as sec. 90 (s) of 51 Vic., cap. 29, by 53 Vic., cap. 23, sec. 1, and the rest was added by 55 and 56 Vic., cap. 27, sec. 3, both parts appearing in the 1906 Act as sec. 152. Section 148 empowers a company which has received Crown lands by way of subsidy or otherwise to convey them to any other company who may have arranged for the construction of the former's line, while section 149 confers a similar power in any case in which lands have been given to a company by

“any corporation or person.” The legislation is declaratory in form and apparently retrospective, the wording being “any company * * * has and from the time of obtaining such right has had,” etc. In **Re Quebec, etc., Ry. Co.**, Q.R. 8 Q.B. 54, it was held independently of any statute that a railway company having obtained subsidies has the right to transfer the same to any other railway company which acquires its franchises; but such assignment would no doubt be subject to all conditions express or implied upon which the lands were originally granted: **Re Calgary, etc., Ry. Co. v. The King**, 8 Ex. C.R. 83, 33 S.C.R. 673, (1904), A.C. 765; and must not be an evasion of the purposes for which the charter was granted. See **Montreal Park and Island R.W. Co. v. Chateauguay & Northern R.W. Co.**, 35 S.C.R. 48, and 4 C.R.C. 83, also note at p. 100.

Purchase of Railway by Person Without Corporate Power to Operate.

150. (1) If any railway, or any section of any railway, is sold under the provisions of any deed or mortgage, or at the instance of the holders of any mortgage, bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding, and is purchased by any person not having corporate power to hold and operate the same, the purchaser shall not run or operate such railway until authority therefor has been obtained as in this section provided.

Purchaser
to obtain
authority to
operate.

(2) The purchaser shall transmit to the Minister an application in writing stating the fact of such purchase, describing the termini and lines of route of the railway purchased, specifying the Special Act under which the same was constructed and operated, and requesting authority from the Minister to run and operate the railway, and shall with such application transmit a copy of any writing preliminary to the conveyance of such railway, made as evidence of such sale, and also a duplicate or authenticated copy of the deed of conveyance of such railway, and such further details and information as the Minister may require.

Application
to Minister.

(3) Upon any such application, the Minister may, if he is satisfied therewith, grant an order authorising the

Minister may
authorize.

purchaser to run and operate the railway purchased until the end of the then next session of the Parliament of Canada, subject to such terms and conditions as the Minister may deem expedient.

Purchaser thereupon authorized to operate railway.

(4) The purchaser shall thereupon be authorised for such period only and subject to such order, to run and operate such railway, and, subject to the other provisions of this Act, to take and receive such tolls in respect of traffic carried thereon as the company previously owning and operating the same was authorised to take, and the purchaser shall also be subject to the terms and conditions of the Special Act of the said company, in so far as the same can be made applicable.

Must apply to Parliament.

(5) The purchaser shall apply to the Parliament of Canada at the next following session thereof after the granting of such order by the Minister, for an Act of incorporation, or other legislative authority, to hold, run and operate the railway.

One extension allowed.

(6) If such application is made to Parliament and is unsuccessful, the Minister may extend the order to run and operate such railway until the end of the then next following session of Parliament, and no longer.

Closing of railway.

(7) If during such extended period the purchaser does not obtain such an Act of incorporation or other legislative authority, such railway shall be closed or otherwise dealt with by the Minister, as may be determined by the Governor in Council.

Provision for temporary operation.

(8) Provided, however, that notwithstanding anything herein contained, the purchaser may, pending the obtaining of authority from the Minister, run and operate the railway for a period not exceeding fifteen days subject to the provisions of this Act and to the terms and conditions of the special Act in so far as the same can be made applicable. R.S., c. 37, s. 299; 1907, c. 38, s. 9. Am.

The words "subject to the other provisions of this Act" in sub-sec. 4 were not in the Act of 1906.

Sub-sec. 5, instead of "after the granting of such order by the Minister" had "after the purchase of such railway."

Sub-section (8) is new.

A railway operated by a purchaser under this section is subject to the jurisdiction of the Board, which may make necessary orders "adapting and applying the provisions of the Act to such a case." See sec. 33 (4).

An individual operating a railway is a "company" within the definition of section 2 (4).

The Railway Act, in common with almost all similar legislation, contemplates the construction and operation of railways exclusively by corporations, and, as stated in **Reg. v. Train**, 3 F. & F. 22, the legal carrying out of such a scheme can only be effected by authority of Parliament. This principle is well explained in Abbott on Railways, p. 1, as follows: "In other words, the legislative authority is required to protect railway companies from the consequences of the doing of that which would otherwise amount to a public nuisance."

The consequence is that, but for some such provisions as those contained in this section, no one but a company having power to operate the railway about to be sold, could afford to buy it, and the market would therefore be exceedingly limited if indeed it existed at all. This provision obviates the difficulty by creating machinery for the temporary operation of the railway, until the necessary legislation can be obtained. An instance of a railway being assigned to individuals and constructed and operated by them, under special legislation will be found in **Hamilton v. Covert**, 16 U.C.C.P. 205.

There does not appear to be any right to foreclose a mortgage upon a railway, and it was held that prior to 46 Vic., cap. 24 (D.), enacting the above section, there was no right to authorise a sale of it, as it could not be operated apart from its charter, and it would be contrary to public policy to allow a sale when it would amount to a virtual shutting down of the enterprise: **Galt v. Erie, etc., Ry. Co.**, 14 Gr. 499, and see **Redfield v. Wickham**, 13 A.C. 467. The latter case, however, decided that this section authorises a sale either under a mortgage deed or under execution, but the Courts of one province cannot authorise the sale of a railway where part of it is without the jurisdiction: **Grey v. Manitoba, etc., Ry. Co.**, 11 Man. L.R. 42, (1987), A.C. 254. In **Redfield v. Wickham**, *supra*, at p. 476, Lord Watson says: "They, (the sections originally enacted), do not suggest that according to the policy of Canadian law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors or incum-

brancees; but they clearly show that the Dominion Parliament has recognized the rule that a railway or section of a railway may, as an integer, be taken in execution and sold like other **immeubles** in ordinary course of law."

In **Central Ontario Ry. Co. v. The Trusts & Guarantee Company, Limited**, 21 T.L.R. 732, (1905), A.C. 576, 4 C.R.C. 340, it was held by the Privy Council, that a railway incorporated by provincial legislation and which has since been declared to be a "work for the general advantage of Canada," can since the passing of the Act 46 Vic., cap. 24, secs. 14, 15 and 16 (D.) (the original of the above section), be validly sold as a going concern, where the sale is under a mortgage or at the instance of holders of bonds secured by a mortgage on the railway, made before or after the passing of that Act or under any other lawful proceeding.

And see note "(b) effect on Provincial Legislation" in General Remarks preceding section 5, *supra*, p. 28.

A municipality may acquire a Dominion railway, but is without power to operate it without authority of the Minister and a subsequent enabling Act. **Re Grand Valley Ry. Co.**, 18 C.R.C. 430.

Agreements for Sale, Lease and Amalgamation.

151. (1) Where the company is authorised by any Special Act of the Parliament of Canada to enter into an agreement with any other company (whether within the legislative authority of the Parliament of Canada or not) for selling, conveying or leasing to such company the railway and undertaking of the company, in whole or in part, or for purchasing or leasing from such company the railway and undertaking of such company, in whole or in part, or for amalgamation, such agreement shall be first approved by two-thirds of the votes of the shareholders of each company party thereto, at an annual general meeting, or at a special general meeting, of each company, called for the purpose of considering such agreement, at each of which meetings shareholders representing at least two-thirds in value of the capital stock of each company are present or represented by proxy.

(2) Upon such agreement being so approved, and duly executed, it shall be submitted to the Board with an application for a recommendation to the Governor in Council for the sanction thereof.

Agreement
for sale, lease
or amalga-
mation of
railway.

Approval of
shareholders.

Board to
recommend
sanction.

(3) Notice of the proposed application for such recommendation shall be published in the **Canada Gazette**, for at least one month prior to the time, to be stated therein, for the making of such application, and also, unless the Board otherwise orders, for a like period in one newspaper in each of the counties or electoral districts through which the railway to be sold, leased or amalgamated, runs, in which a newspaper is published.

Notice in
Canada
Gazette.

(4) Upon such notice being given the Board shall grant or refuse such application, and upon granting the same shall make a recommendation to the Governor in Council for the sanction of such agreement.

Action
Board.

(5) Upon such agreement being sanctioned by the Governor in Council, a duplicate original of such agreement shall be filed in the office of the Secretary of State of Canada; and thereupon such agreement shall come into force and effect, and notice thereof shall be forthwith given in the **Canada Gazette**.

Proceedings
upon sanc-
tion.

Notice.

(6) The production of the **Canada Gazette** containing the notice mentioned in sub-section five of this section shall be **prima facie** evidence that the requirements of this section have been complied with.

Evidence.

(7) Whenever the agreement does not involve any sale or amalgamation and may be terminated by either company on giving a notice not exceeding twelve months, the Board may, notwithstanding anything in this section, by order or regulation, exempt the company from complying with any of the foregoing conditions with respect to any such agreement. R.S., c. 37, s. 361. Am.

Exemptions
in certain
cases.

The words in parenthesis in subsection (1) are new. Subsection (7) is new.

Sub-section 6 in the Act of 1906 read as follows: "The production of the **Canada Gazette** containing such notice shall be **prima facie** evidence of the requirements of this section being complied with." See note to sec. 98.

Power to Amalgamate. Amalgamation without express statutory authority is a delegation by one company to another of the powers conferred upon it by Act of Parliament and as such is unlawful: *Hodges on Railways*, 7th Ed. 54; *Great Northern Ry. Co. v. Eastern Counties Ry. Co.*, 9 Hare 306. *Michigan Central Ry. Co. v. Weal-*

leans, 24 S.C.R. 309; and it is equally unlawful on grounds of public policy for a railway company to agree to abstain from exercising its charter powers: **Montreal, etc., Ry. Co. v. Chateauguay, etc., Ry. Co.**, 35 S.C.R. 48, 4 C.R.C. 83. If such an agreement is brought about in any manner as by the transfer of its stock by one company to another without any provision for its restoration, it is invalid: **G.N. Ry. Co. v. Eastern Counties Ry. Co.**, *supra*, and where the London & N.W. Ry. Co. were to work the lines of the Birkenhead R.W. Co., using its property and plant, and charging a fixed sum for working expenses, this was considered to be a virtual amalgamation and therefore void: **Winch v. Birkenhead, etc., Ry. Co.**, 16 Jur. 1035. The subject of leasing the line to another and amalgamating with it was discussed at length in **Carleton, etc., Ry. Co. v. Grand Southern Ry. Co.**, 21 N.B.R. 339, where it was held in an action for an injunction that the Courts would not enforce an agreement by one company authorising another to build a separate track alongside its own on its right of way and leasing a portion of its lands for that purpose. In **Beman v. Rufford**, 1 Sim. (N.S.), 550, an agreement that two companies should work a third company and have perfect control of it and exercise all its rights and work it for twenty-one years, was considered to be illegal, but in **Midland Ry. Co. v. G.W. Ry. Co.**, L.R. 8 Ch. 841, at p. 858, Mellish, L.J., thought that while an agreement which practically amounts to a lease and which prevents the lessor company from entering into a contract with other companies might be invalid, yet a working agreement having no exclusive clauses in it would be valid even though the practical effect might be that the lessee company was the only one which from its geographical situation could practically work the line, the saving element in the latter contract being that the lessor might at any moment when it thought it advantageous, work the line again for its own benefit or enter into an agreement with some other company to do so.

Invalid leases or agreements for amalgamation must, however, be distinguished from mere working agreements which under 8 Vict., cap. 20, sec. 87 (Imp.), as under section 154, *infra*, might be perfectly valid as in **Llangelly Ry. Co. v. London, etc., Ry. Co.**, L.R. 7 H.L. 550, which provided that the defendants should, subject to plaintiffs' by-laws, have running powers over their lines, should maintain their own staffs at plaintiffs' offices and carry plaintiffs' traffic, if required (but only if required), by the latter. This agreement was upheld as being a

mere working arrangement; but if such an agreement required the running company to operate the other's lines and guarantee a "toll" which was in effect a guarantee of dividends on the former's stock it would be invalid as a complete delegation of its powers: **Simpson v. Dennison**, 10 Hare 51, and where receipts were to be brought into one common fund and divided in fixed proportions it would be illegal: **Charlton v. Newcastle, etc., Ry. Co.**, 7 W.R. 731. A mere transfer of assets by one joint stock company to another will not thereby merge the two companies into one: **Maple Leaf Rubber Co. v. Brodie**, Q.R. 18 S.C. 352.

The cases in England upon the amalgamation of railways are numerous but turn generally upon the construction of terms contained in the special Acts authorising such a course. They are collected in *Hodges on Railways*, pp. 54 to 57, and notes. Reference may particularly be made to **Shrewsbury, etc., Ry. Co. v. Shropshire, etc., Ry. Co.**, 6 H.L.C. 113, where the subject of amalgamation was much discussed and it was stated by Lord Cranworth, at p. 131, that a railway company cannot grant a lease of its property and lines unless authorised by Act of Parliament to do so: **East Anglian Ry. Co. v. Eastern Counties Ry. Co.**, 11 C.B. 775. See also notes to section 154, *infra*.

152. Upon any agreement for amalgamation coming into effect, as provided in the last preceding section, the companies, parties to such agreement, shall, subject to the provisions of this Act and the Special Act authorising such agreement to be entered into, be deemed to be amalgamated, and shall form one company, under the name and upon the terms and conditions in such agreement provided; and the amalgamated company shall possess and be vested with all the railways and undertakings, and all other the powers, rights, privileges, franchises, assets, effects, and properties, real, personal and mixed, belonging to, possessed by, or vested in the companies, parties to such agreement, or to which they, or any or either of them, may be or become entitled; and shall be liable for all claims, demands, rights, securities, causes of action, complaints, debts, obligations, works, contracts, agreements, or duties, to as full an extent as any or either of such companies was, at or before the time

Amalgamation.

Powers, etc., of amalgamated company.

when the amalgamation agreement came into effect. R. S., c. 37, s. 362.

Saving of
rights and
claims.

153. (1) Notwithstanding anything in any agreement made or sanctioned under the provisions of the last two preceding sections, every act, matter or thing done, effected or confirmed under or by virtue of this Act, or the Special Act, before the date of the coming into effect of such agreement, shall be as valid as if such agreement had never come into effect; and such agreement shall be subject and without prejudice to every such act, matter or thing, and to all rights, liabilities, claims and demands, present or future, which would be incident to, or consequent upon such act, matter or thing if such agreement had never come into effect.

Amalgamated com-
pany in
place of
former com-
panies.

(2) In the case of an agreement for amalgamation, as to all acts, matters and things so done, effected or confirmed, and as to all such rights, liabilities, claims and demands, the amalgamated company shall for all purposes stand in the place of and represent the companies who are parties thereto and the generality of the provisions of this section shall not be deemed to be restricted by any Special Act, unless this section is expressly referred to in such Special Act, and expressly limited or restricted thereby. R.S., c. 37, s. 363.

Apart from such a saving clause as this the Courts will always endeavor so to construe legislation approving of amalgamation so that the rights of those having claims against the original companies will be protected. Therefore an Act authorising the union of two companies and declaring that any deed executed by them under the Act should be valid to "all intents and purposes in the same manner as if incorporated in the Act," while it gave the companies power to bargain in respect of their own rights gave them no legislative authority over the rights of third persons: **Cayley v. Cobourg, etc., Ry. Co.**, 14 Gr. 571; and see **Fargey v. Grand Junction Ry. Co.**, 4 O.R. 232; and **Demorest v. Midland Ry. Co.**, 10 P.R. 73. Such a saving clause would not in the absence of express declaration to the contrary be construed so as to render a company taking over another line, liable for claims not recoverable against the line so taken over: **Attorney-General v. Macdonald**, 6 Man. L.R. 372; but where a joint traffic agreement was made with the Toronto, Grey &

Bruce Ry. Co., which was attacked on the ground of **ultra vires**, it was held that defendants who had taken over that road and were bound to assume all its contracts, the traffic being specially mentioned in the legislation sanctioning the amalgamation, were unable to contend that it was invalid even though such a contention might have been open to the Toronto, Grey & Bruce Railway: **Owen Sound, etc., Co. v. C.P.R.**, 17 O.R. 691, 17 A.R. 482. As to the effect of amalgamation, see **Attorney-General v. North Eastern Ry. Co.** (1906), 1 Ch. 310, (1906), 2 Ch. 675.

Agreements for Interchange of Traffic and Running Rights

154. (1) The directors of the company may, at any time, make and enter into any agreement or arrangement, not inconsistent with the provisions of this or the Special Act, with any other company, either in Canada or elsewhere, for the interchange of traffic between their railways or vessels, and for the division and apportionment of tolls in respect of such traffic.

Directors may make traffic agreements.

(2) The directors may also make and enter into any agreement or arrangements, not inconsistent with the provisions of this or the Special Act, for any term not exceeding twenty-one years,—

And agreements for—

(a) for the running of the trains of one company over the tracks of another company;

Running powers;

(b) for the division and apportionment of tolls in respect of such traffic;

Division of tolls;

(c) generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith; and,

Management and working;

(d) to provide, either by proxy or otherwise, for the appointment of a joint committee for the better carrying into effect of any such agreement or arrangement, with such powers and functions as are considered necessary or expedient;

Joint committee.

subject to the like consent of the shareholders, the sanction of the Governor in Council upon the recommendation of the Board, application, notices and filing, as hereinbefore provided with respect to amalgamation agree-

Conditions.

Proviso.

ments: Provided that publication of notices in the **Canada Gazette** shall be sufficient notice, and that the duplicate original of such agreement or arrangement shall, upon being sanctioned, be filed with the Board.

Board may exempt from conditions.

(3) The Board may, notwithstanding anything in this section, by order or regulation, exempt the company from complying with any of the foregoing conditions, with respect to any such agreement or arrangement made or entered into by the company for the transaction of the usual and ordinary business of the company, and where such consent of the shareholders is deemed by the Board to be unnecessary.

Saving.

(4) Neither the making of any such arrangement or agreement, nor anything therein contained, nor any approval thereof, shall restrict, limit, or affect any power by this Act vested in the Board, or relieve the companies from complying with the provisions of this Act. R.S., c. 37, s. 364.

The words "of the company" have been inserted after the word "directors" in sub-sec. (1).

An agreement between a railway company and a steamship line for a fixed through rate and a rateable division of the proceeds is quite within the powers of a railway company: **Owen Sound Steamship Co. v. C.P.R. Co.**, 17 O.R. 691, 17 A.R. 482. As to damages for breach of an agreement between a railway company and a steamship company that the former would furnish the latter with cargo: see **Great Northern Ry. Co. v. Furness Withy & Co.**, 42 S.C.R. 234; Q.R. 32 S.C. 121; 10 C.R.C. 479. There is no principle of public policy which renders void a traffic agreement between two railways for the purpose of avoiding competition: **Hare v. London, etc., Ry. Co.**, 2 J. & H. 80, and a stipulation not to compete upon certain parts of the line is no such fraud upon the public as to render an agreement to that effect invalid: **Shrewsbury, etc., Ry. Co. v. London, etc., Ry. Co.**, 17 Q.B. 652, nor, *semble*, is an agreement that one of the contracting companies will not carry traffic over a particular portion of its line: **Lancaster, etc., Ry. Co. v. N.W. etc., Ry. Co.**, 2 K. & J. 293; but an agreement by one company not to operate its line is invalid: **Montreal, etc., Ry. Co. v. Chauteaguay, etc., Ry. Co.**, 35 S.C.R. 48, 4 C.R.C. 83, as is also an alienation by a company of the tolls to be earned upon a portion of its line, and directors have no power to make any such agreement; **Shrewsbury, etc.,**

Ry. Co. v. London, etc., Ry. Co., 22 L.J., Ch. 682, nor have directors any power to enter into an agreement fixing and regulating the future traffic to be carried over a line which the company proposes to construct so as to give another company an interest in such traffic and the profits arising from it: **Midland Ry. Co. v. London, etc., Ry. Co.**, L.R. 2 Eq., 524; and where a working agreement respecting their existing lines has been made by two companies, it is not to be assumed that such companies are to be prohibited from constructing other lines to which it shall not apply and such an agreement if made would probably be *ultra vires*: **Midland Ry. Co. v. London, etc., Ry. Co.**, *supra*. A stipulation to divide profits earned on a common portion of the line is not invalid: **Shrewsbury, etc., Ry. Co. v. London, etc., Ry. Co.**, 17 Q.B. 652. Where one railway company grants to another the use of its lines, stations and facilities without any restriction upon such use, it cannot prevent the grantee from using the same for any lawful object even though it would have no power to make a similar use of them itself: **Great Northern Ry. Co. v. Eastern Counties Ry. Co.**, 9 Hare 306.

See **Michigan Central Ry. Co. v. Lake Erie, etc., Ry. Co.**, 6 C.R.C. 83; **Algoma, etc., Ry. Co. v. G.T.R.**, 5 C.R.C. 196; 8 C.R.C. 46.

Traffic Agreements in Canada. The original of this clause was first enacted by 22 Vict., cap. 4, sec. 2, and the tendency of the Courts has been to construe it liberally. In **Michigan Central Ry. Co. v. Wealleans**, 24 S.C.R. 309, at p. 317, Sedgwick, J., says: "The object of the legislature was to facilitate in every possible way the operation and working of railways generally throughout Canada and to legalize the bringing in of foreign railways and the capital of foreign railway companies for that purpose. We are therefore required to give such a construction to the section in question as will best give effect to that policy provided we keep within the expressed intention of the legislature as manifested in the section itself." Accordingly an agreement by a foreign railway company with the Canada Southern Railway Company, by which it took possession of the latter's line and was to "maintain, work and operate" it in the manner provided in the agreement, was upheld by the Supreme Court as valid, both under the above general clause and under the Special Act of the Canada Southern Railway Company; reversing in this respect, **Wealleans v. Canada Southern Ry. Co.**, 21 A.R. 297. Where also an agreement was entered into pursuant to this section providing for the same rates on through traffic, a division of the profits in specified

proportions and the rendering of mutual statements; the agreement was considered to be valid so far as its terms were concerned, but as it was not pleaded that the necessary two-thirds majority of the shareholders had approved for it, it was treated as invalid on this account and the fact that such shareholders had subsequently in annual and other reports, been advised of it and had not objected was not treated as equivalent to their consent: **Great Western Ry. Co. v. G.T.R.**, 24 U.C.R. 107, 25 U.C.R. 37. An agreement between two companies for the purpose of combining their rolling stock plant and material and of working and operating both lines and exercising the franchises of both under the joint management of both companies for twenty-one years and of appointing a joint committee called an "Executive Committee" was upheld and it was laid down that similar but less elastic provisions in the companies' private statutes did not limit the operation of this general enactment. The case contains a review of many of the English decisions down to 1879; **Campbell v. Northern Ry. Co.**, 26 Gr. 522.

Maintenance of premises by working company. Where one company agreed to maintain the premises of another in substantial repair it was bound to repair damages due, as it contended, to natural causes or the original defective construction of the line: **North Eastern Ry. Co. v. Scarborough, etc., Ry. Co.**, 8 Ry. & C. Tr. Cas. 157. Under the power to "maintain" a railway, reasonable improvements consistent with the purpose of the undertaking are included: **Sevenoaks, etc., Ry. Co. v. London, etc., Ry. Co.**, 11 Ch. D. 625.

Approval of agreement by Governor in Council. This section and section 151 are evidently based on the English Railway Clauses Act 1863, 26 & 27 Vict., cap. 92, sec. 22, as amended by 36 & 37 Vict., cap. 48, sec. 10; but they have been a good deal altered and are less elaborate. It will be observed that the powers of the Board with reference to working agreements and agreements for amalgamation are advisory only, the Governor in Council being the body clothed with final authority to sanction or otherwise deal with the agreement. In England the Board of Trade and later the Railway Commissioners have had to consider a number of working agreements and the cases recording their decisions upon them are collected in Hodges on Railways (7th Ed.), pp. 527 to 530. It is said in that work at p. 527, that the Commissioners have regarded their duties in relation to the approval of working agreements as being (1), To ascer-

tain that the companies have the power to enter into the agreement submitted for approval. (2), To ascertain whether if entered into, such working agreements will be advantageous to the interests of the public; and (3), To ascertain that their own powers under the Railway Clauses Act (1863), and the Regulation of Railways Act (1873), are not affected by the proposed agreement. The following cases on this subject may be consulted: **Huddersfield v. Great Northern, etc., Ry. Co.**, 4 Ry. & C. Tr. Cas. 44; **Re Taff Vale, etc., Ry. Co.'s Working Agreement**, 4 Ry. & C. Tr. Cas. 54.

The consent of the Governor in Council is not one of the "foregoing conditions" from which the Board can exempt under sub-section 3. of this section: **Re G.T.R. Co. and Quebec M. & S. Ry. Co.**, 23 C.R.C. 101.

Where the agreement has been validated by statute the Board has no jurisdiction under this section: **Bay of Quinte R.W. Co. v. Kingston, etc., Ry. Co.**, 8 C.R.C. 202.

Power of Board to vary agreements. Sub-section 4, *supra*, may be compared with the more elaborate but similar provision in 51 & 52 Vict., cap. 25, sec. 11 (Imp.), under which it was held that the Railway Commissioners might set aside an agreement previously entered into which required a railway company to accept no coal for carriage at one of its stations unless mined from the "Petre Estate": **Rishton v. Lancashire, etc., Ry. Co.**, 8 Ry. & C. Tr. Cas. 74. On this Wills, J., says at p. 81, "Section 11 of the Act of 1888 is more sweeping still and it seems to me that that also was passed for the very purpose of removing any possible doubt as to the jurisdiction of this Court to interfere with private arrangements of this kind when public considerations and the public interests require it."

Insolvent Companies.

155. (1) Where a company is unable to meet its engagements with its creditors, the directors may prepare a scheme of arrangement between the company and its creditors, and may file it in the Exchequer Court.

Scheme may
be filed in
Exchequer
Court.

(2) Such scheme of arrangement may or may not include provisions for settling and defining any rights of shareholders of the company as among themselves, and for the raising if necessary of additional share and loan capital.

May affect
shareholders
and capital.

(3) There shall be filed with such scheme of arrangement,—

Declaration
to be filed.

(a) a declaration in writing under the common seal of the company to the effect that the company is unable to meet its engagements with its creditors; and,

Affidavit.

(b) an affidavit made by the president and directors of the company, or by a majority of them, that such declaration is true to the best of their respective judgments and beliefs.

Court may
restrain
action.

(4) After the filing of the scheme, the Exchequer Court may, on the application of the company, on summons or motion in a summary way, restrain any action against the company on such terms as the Exchequer Court thinks fit.

Notice of
filing.

(5) Notice of the filing of the scheme shall be published in the **Canada Gazette**.

No execution
without
leave.

(6) After such publication of notice, no execution, attachment, or other process against the property of the company shall be available without leave of the Exchequer Court, to be obtained on summons or motion in a summary way. R.S., c. 37, s. 365.

General Remarks. This legislation, first enacted in 1901 by 1 Edw. VII., c. 31, gives remedies other than by the appointment of a receiver on behalf of bondholders discussed in notes to section 145, or by the sale of a railway which was dealt with under section 150. It is copied from the English Railway Companies Act, 1867, 31 & 32 Vict., cap. 127, secs. 6 to 21, with some amendments and omissions; but lacks the accompanying provision (section 4), that the rolling stock of a railway in operation shall not be seized under execution, but the creditor must levy by applying for the appointment of a receiver.

Constitutionality. Although the Province of Nova Scotia enacted similar legislation by 37 Vict., cap. 104, appearing at page 1 of the statutes of 1875, doubts were thrown upon its constitutionality in **Murdoch v. Windsor, etc., Ry. Co.**, Russ, Eq. R. (N.S.), 137, 3 Cart. 368, and in **Re Windsor, etc., Ry. Co.**, 16 N.S.R. 312, 3 Cart. 387, because by the B.N.A. Act, section 91 (21), legislation respecting "Bankruptcy and Insolvency" is within the exclusive jurisdiction of the Dominion of Canada and therefore in the **Murdoch Case** it was decided that there was no power to affect the rights of creditors even of a pro-

vincial railway company by a scheme drawn up pursuant to the Nova Scotian statute. Where, however, the proposed scheme merely amounted to a change in the character of the capital stock of the company it was held that for that purpose it could not be considered to be bankruptcy legislation and therefore unconstitutional and the scheme was approved: **Re Windsor, etc., Ry. Co.**, 16 N.S. R. 312, 3 Cart. 387. This statute was re-enacted in 1884 as R.S.N.S., cap. 54, but while not repealed, was not consolidated in the Revised Statutes of 1900.

In Quebec an Act was passed (56 Vict., cap. 36), providing for the sequestration and sale of any railway subsidized by the local government and which either becomes insolvent or fails to carry out the obligations imposed upon it by its charter and this statute was held to be constitutional even though the railway had been declared to be a work for the general advantage of Canada: **Nantel v. Baie des Chaleurs Ry. Co.**, Q.R. 9 S.C. 47; **Baie des Chaleurs Ry. Co. v. Nantel**, Q.R. 5 Q.B. 64 (Hall and Wurtele, J.J., dissenting). It is doubtful whether this decision would be now followed as it in effect declares that a provincial statute may interfere with the road-bed and operation of a Dominion railway: see **Madden v. Nelson, etc., Ry. Co.**, (1899), A.C. 626; **C.P.R. v. Roy** (1902), A.C. 220, 1 C.R.C. 196; reversing **C.P.R. v. Roy**, Q.R. 9 Q.B. 551, 1 C.R.C. 170, and notes 2 C.R.C. 265, et seq. **Monkhouse v. G.T.R.**, 8 A.R. 637; **C.P.R. v. The King**, 39 S.C.R. 476; 7 C.R.C. 176; also **C.P.R. v. Notre Dame de Bonsecours** (1899), A.C. 367; **Geddis v. Bann Reservoir**, 3 App. Cas. 430, at p. 438; **Hammersmith Ry. Co. v. Brand**, L.R. 4 H.L. 171; and see note "General Remarks," preceding sec. 5, p. 24. As by section 91 of the B.N.A. Act, the Federal Parliament has jurisdiction in respect of "Bankruptcy and Insolvency," there is no doubt of its power to pass this legislation, and, conceivably, it could be made applicable to provincial as well as federal railways. It is not clear from the terms of the statute whether provincial railways could take the benefit of it. It was originally passed as an amendment to the Railway Act 1888, and not as a substantive statute: 1 Edw. VII., cap. 31, sec. 17, and presumably applies only to railways otherwise within the purview of that statute. The term "company" appearing throughout the section is defined by section 2 (4) to mean "a railway company" and when so used, it "includes every such company and any person having authority to construct or operate a railway" while by section 5, *ante*, the Railway Act is to "apply to all persons, companies and railways within the legislative auth-

ority of the Parliament of Canada." For the purpose of bankruptcy legislation, every company, however incorporated, may be within the legislative authority of Canada, and therefore this part of the Act might well be applied to provincial as well as Dominion railway companies. But the implication of sub-section 4 (b) and of section 8, is, as pointed out by Duff, J., in **Montreal Tramways v. Lachine Ry. Co.**, 18 C.R.C. 122; 50 S.C.R. 84, that the Act does not apply to provincial railways except as specifically so provided.

Scope of section. The settlement of creditors' claims is the object of the clause and any scheme providing for raising a large amount of loan capital without providing for the ultimate payment of creditors will not be sanctioned: **Re Letterkenny Ry. Co.**, I.R. 4 Eq. 538. In any such scheme the various classes of creditors must be fairly treated and it should show a reasonable prospect of providing for the ultimate payment of their claims: **Murdoch v. Windsor, etc., Ry. Co.**, Russ. Eq. (N.S.), at p. 140; but a scheme which appears to be honestly framed with a view to the benefit of all parties will not be rejected because a portion of the assets comprised in it was appropriated for payment of debenture interest: **Re East & West India Dock Co.**, 44 Ch. D. 38, and a scheme for converting mortgages and bonds into irredeemable debenture stock is within the scope of the section: **Re Irish, etc., Ry. Co.**, Ir. R. 2 Eq. 425, 3 Eq. 190; and see **Re Windsor, etc., Ry. Co.**, 16 N.S.R. 312.

Effect on creditors. It will be observed that while by section 156, *infra*, provision is made for rendering a scheme binding on debenture holders, the holders of rent charges or charges on income, and the holders of guaranteed, preferred or ordinary stock, no provision is made for binding any outside creditor unless he assents to it, and so where a scheme proposed that outside creditors should receive fully paid up shares in full of their claims, which were to be thereby discharged, the Court refused in view of the opposition of some of the outside creditors to approve the scheme and laid down the rule that where a scheme contains a clause seriously affecting the rights of outside creditors, the Court will require the consent in writing of every such outside creditor before it confirms the scheme: **Re Bristol, etc., Ry. Co.**, L.R. 6 Eq. 448; but where such a scheme does not purport to bind outside creditors and its appropriation of the free assets could not be complained of by them as they had no lien upon such assets and the scheme appeared to be honestly framed for the benefit of all parties, the Court would not

give effect to the objections of a large unsecured creditor, who not being bound by the scheme is still entitled to look to the assets (if any) of the company after secured creditors have been paid: **Re East & West India Dock Co.**, 44 Ch. D. 38 per Chitty, J., at p. 44, quoting **Stevens v. Mid-Hants Ry. Co.**, L.R. 8 Ch. 1064, 1068; see also **Re Cambrian Ry. Co.'s Scheme**, L.R. 3 Ch. 278. Even though creditors are not bound by a scheme, the Court has not merely permitted them to be heard, but in certain cases has given effect to their objections by declining to sanction the scheme: **Re Bristol, etc., Ry. Co.**, L.R. 6 Eq. 448; **Re Somerset, etc., Ry. Co.**, 18 W.R. 332. As explaining the general principle of this legislation, Cotton, L.J., in **Re East & West India Dock Co.**, *supra*, at p. 65, says: "What we have to consider is, does not this scheme afford a reasonable prospect of providing for the payment of creditors. That is really the principal object of the scheme. If the company say 'we cannot pay our creditors,' then a scheme must be prepared, and it will be binding as between the company and its shareholders and debenture holders, but it is prepared with a view of paying the creditors." The secretary of the company to whom salary is due is no more bound by the scheme than any other outside creditor though he may not have opposed it: **Re Teign Valley Ry. Co.**, 17 W.R. 817. The rights of debenture holders or secured creditors are noted under section 156, *infra*.

Stay of proceedings. Sub-section 4 of section 155 provides for staying actions while a scheme is maturing and though outside creditors may not be ultimately bound by it, yet where honestly framed with a view to protecting all interests the Court will stay an outside creditor's action during the period allowed for perfecting it and obtaining the necessary approval, but it will not do so unless the scheme proposes to make reasonable provision for the payment of such creditors: **Re Cambrian Ry. Co.'s Scheme**, L.R. 3 Ch. 278, and in a proper case such proceedings will be stayed even though the three months allowed by section 157, *infra*, have elapsed and no extension of time has been granted: **Robertson v. Wrexham, Mold, etc., Ry. Co.**, 17 W.R. 137; though in this case such a stay was granted on terms that the defendants would consent to judgment being entered for the plaintiff's claim. Where an application was made on behalf of a railway company for an order restraining further proceedings against such company begun in the Superior Court, by certain creditors, before the filing of the scheme of arrangement, it was held that as there were real is-

sues to be tried out between the parties, the action in the Superior Court should be allowed to proceed pending the maturing of the scheme of arrangement. **In re Atlantic & Lake Superior Ry. Co.**, 9 Ex. C.R. 283, 5 C.R.C. 418; **In re Great Northern Ry. Co.**, 9 Ex. C.R. 337, 5 C.R.C. 416. The power of the Court to stay an action upon a summary application under sub-section 4, *supra*, is gone when the scheme has been enrolled and approved by the Court under section 157, sub-section 4, *infra*; after enrolment the company cannot obtain an injunction either against an outside creditor or one bound by the scheme, except by bringing an action therefor: **Re Potteries, etc., Ry. Co.**, L.R. 5 Ch. 67. Sub-section 6, *supra*, also has reference only to the period before enrolment of the scheme; after enrolment leave to issue execution need not be obtained by any one not bound by it: **Re Potteries, etc., Ry. Co.**, *supra*; nor is leave necessary in any case where a scheme has been considered and dismissed: **Re Bristol, etc., Ry. Co.**, 20 L.T.N.S. 70; but while still pending, creditors must obtain leave before they can issue execution upon a writ of *sci fa*, against a shareholder for unpaid calls due under his share by virtue of section 109, *supra*; **Re Devon, etc., Ry. Co.**, 6 Eq. 610; and a person holding debentures was forbidden to bring an action upon them during the period of suspense: **London Financial Association v. Wrexham, Mold, etc., Ry. Co.**, 18 Eq. 566.

Assent to
scheme.

156. (1) The scheme shall be deemed to be assented to,—

By bond-
holders.

(a) by the holders of mortgages or bonds issued under the authority of this or any Special Act relating to the company, when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds;

By debenture
holders.

(b) by the holders of debenture stock of the company, when it is assented to in writing by three-fourths in value of the holders of such stock;

By charge
holders.

(c) by the holders of any rent charge, or other payment, charged on the receipts of or payable by the company in consideration of the purchase of the undertaking of another company, when it is assented to in writing by three-fourths in value of such holders;

By preference
share-
holders.

(d) by the guaranteed or preference shareholders of the company, when it assented to in writing by three-fourths in value of such shareholders, if

there is only one class of such shareholders, or three-fourths in value of each class, if there are more classes of such shareholders than one;

- (e) by the ordinary shareholders of the company, when it is assented to by a special meeting of the company called for that purpose. By ordinary shareholders.

(2) Where the company is lessee of a railway, the scheme shall be deemed to be assented to by the leasing company when it is assented to,— Assent of leasing company.

- (a) in writing, by three-fourths in value of the holders of mortgages, bonds and debenture stock of the leasing company; Bondholders.

- (b) in writing, by three-fourths in value of the guaranteed or preference shareholders of the leasing company, if there is only one such class, and by three-fourths in value of each class, if there are more classes than one of such shareholders; and, Preference shareholders.

- (c) by the ordinary shareholders of the leasing company at a special meeting of that company called for that purpose. Ordinary shareholders.

(3) The assent to the scheme of any class of holders of mortgages, bonds or debenture stock, or of any class of holders of a rent charge or other payment as aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company. R.S., c. 37, s. 366. No assent required from class not interested.

Assent of debenture holders and shareholders. After a scheme has been duly assented to by three-fourths in value of the debenture holders, dissenting debenture holders though entitled to appear and state their objections will be bound by the scheme unless it can be shewn that the approval of the majority was obtained by fraud: **Re East & West, etc., Ry. Co.**, L.R. 8 Eq. 87. The assent of the statutory majority of three-fourths of any class cannot be dispensed with if any existing right of that class is "prejudicially affected" under sub-section 3, *supra*, it being for them and not for the Court to consider whether the scheme gives them such benefits that their rights on the whole are not "prejudicially affected:" **Re Neath & Brecon Ry. Co.** (1892), 1 Ch. 349. Though a debenture holder has a judgment for the amount of his debenture and interest, he is still a debenture holder, and cannot

claim that he is an outside creditor and not bound by the scheme as not assenting to it: **Potteries, etc., Ry. Co. v. Minor**, L.R. 6 Ch. 621. And where the holder of debentures has turned his security into irredeemable debenture stock he will still be bound by any scheme of arrangement which is binding on the debenture holders: **London Financial Association v. Wrexham, Mold, etc., Ry. Co.**, L.R. 18 Eq. 566. Holders of preferred half-shares do not form a separate class who must separately approve of the scheme under this section: **Re Brighton & Dyke Ry. Co.**, 44 Ch. D. 28; but though preference shareholders are given the same right of voting at meetings as ordinary shareholders, the consent of preference shareholders as a separate class must still be obtained: **Re Cambrian Ry. Co.**, 19 W.R. 871.

Application
for confirma-
tion of
scheme.

157. (1) If, at any time within three months after the filing of the scheme, or within such extended time as the Exchequer Court, from time to time, thinks fit to allow, the directors of the company consider the scheme to be assented to, as by this Act required, they may apply to the Exchequer Court by petition in a summary way for confirmation of the scheme.

Notice of
application.

(2) Notice of any such application shall be published in the **Canada Gazette**.

Confirmation
of court.

(3) The Court, after hearing the directors, and any creditors, shareholders or other persons whom it thinks entitled to be heard on the application, may confirm the scheme, if satisfied that the scheme has been assented to, as required by this Act, within three months after the filing of it, or within such extended time, if any, as the Court has allowed, and that no sufficient objection to the scheme has been established.

Enrolment
in court.

(4) The scheme when confirmed shall be enrolled in the Exchequer Court, and thenceforth it shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all persons, have the like effect as if they had been enacted by Parliament.

Notice
thereof.

(5) Notice of the confirmation and enrolment of the scheme shall be published in the **Canada Gazette**. R.S., c. 37, s. 367. Am.

An important change has been made in sub-sec. 4, by the omission, after the word "persons," of the words,

“assenting thereto or bound thereby” which were in the Act of 1906.

Confirmation and Enrolment. Where a scheme had been confirmed, the enrolment of the confirmation order was stayed on the application of outside creditors who within thirty days from the date of the order had applied for a re-hearing: **Re Devon, etc., Ry. Co.**, 6 Eq. 615. After enrolment, the right to apply by summary application for a stay of a creditor's action, no longer exists; but where the creditor or others are bound by the scheme an action for a stay and for an injunction in the usual course is proper: **Re Potteries, etc., Ry. Co.**, L.R. 5 Ch. 67, and notes to section 155, *supra*.

Staying proceedings. It was said in **Re Manchester & Milford Ry. Co.**, W.N. (1881), 121, that the Court may amend and alter the scheme, but no such right is expressly given and it was decided in **Re Neath & Brecon Ry. Co.** [1892], 1 Ch. 349, that no order would be made in the absence of consent from three-fourths of every class “prejudicially affected” by any order. Such a rule if it exists must therefore necessarily be subject to modification in this respect. See notes to section 156, *supra*. Where the rules of practice make provision for binding absent parties by published notices or other means, the Court may invoke such rules for the purpose of binding absent debenture holders by a proposed scheme of arrangement: **Saragossa, etc., Ry. Co. v. Collingham** [1904] A.C. 159, reversing **Collingham v. Sloper** (1901) 1 Ch. 769.

158. The Judge of the Exchequer Court may make general rules for the regulation of the practice and procedure of the Court under the three last preceding sections of this Act, which rules shall have force and effect when they are approved by the Governor in Council. R.S., c. 37, s. 368.

Rules of practice.

159. The company shall at all times keep at its principal or head office printed copies of the scheme when confirmed and enrolled, and shall sell such copies to all persons desiring to buy them at a reasonable price, not exceeding ten cents for each copy. R.S., c. 37, s. 369.

Copies of the scheme to be kept for sale.

A penalty not exceeding one hundred dollars, with a further penalty of twenty dollars for each day of non-compliance after the first penalty is incurred, is imposed by sec. 395 for breach of this section.

Sale of Subsidized Railways not Kept in Repair.

Subsidized railways must be in safe and efficient condition.

160. (1) Whenever it is made to appear to the Minister that any railway owned by a company incorporated by the Parliament of Canada, the construction of which has been aided by a subsidy from the Government of Canada, cannot by reason of the condition of such railway or of its equipment be safely and efficiently operated, the Minister may apply to the Board for an order that the said railway, or its equipment, or both, shall be put in a safe and efficient condition, which order the Board is hereby authorised to make after such notice to the president or manager of the company and the trustee of the bondholders, if any, as to the Board seems reasonable, and the Board may, by order, direct what repairs, improvements or additions shall be made to the said railway, or equipment, or both, and within what times the same shall be undertaken and completed respectively.

Application to Board.

On failure of company to comply with order, a lien may be created.

(2) If the company fails to comply with such order of the Board, the Governor in Council may, upon the recommendation of the Minister, approve of such order, and direct that a copy of such order and of the order of the Governor in Council approving thereof, certified by the Secretary of the Board and the Clerk of the Privy Council respectively, shall be filed by the Minister in the office of the Registrar of Deeds of each county through which such railway runs, and upon such orders being so filed there shall, **ipso facto**, be created a first lien or mortgage upon the said railway and its equipment in favour of His Majesty for the amount of the said subsidy, which shall immediately thereupon become due and payable to His Majesty. Such lien may be enforced by His Majesty in the same manner and by the like proceedings as any other lien upon property may be enforced by His Majesty in the Exchequer Court of Canada. The said Court may order such railway and its equipment to be sold to satisfy such lien, and pending such lien may appoint a receiver to manage and operate such railway. Any moneys realized from such sale may, with the consent of the purchaser, be applied by the Minister under the direction of the Chief Engineer of Government Railways towards the

Enforcement of lien.

repair and improvement of such railway and equipment so far as the same may be deemed necessary by the Minister, and any moneys so realized, and not in the opinion of the Minister required for such repairs and improvements, may be paid to the company owning the railway at the time of the sale, or to the trustee for the holders of any outstanding bonds or other securities secured by mortgage or otherwise upon such railway. 1911, c. 22, s. 13. Am.

The concluding portion of the section as originally enacted in 1915 read: "or to the trustee for bondholders in the event of there being outstanding bonds secured by mortgage or otherwise upon such railway."

The section was passed to enable the Government to bring pressure to bear upon certain small subsidized lines in various parts of Canada, which have fallen into a condition of dangerous disrepair and are not operated efficiently; but as this condition is due to lack of revenue, the section has not proved effective.

Powers—Construction of Railways.

Limitation of Time for Construction.

161. If the construction of the railway is not commenced and fifteen per centum of the amount of the capital stock is not expended thereon in survey, purchase of right of way, and actual construction work, or, in the case of a branch or extension of the railway, if fifteen per centum of the bond issue authorised therefor is not expended thereon in actual construction work, within two years after the passing of the Act authorising the construction of such railway, branch, or extension, 'as the case may be, or, where the Parliament of Canada grants an extension of the time for commencing such construction, within the time so granted; or, if the railway, or branch or extension, as the case may be, is not completed and put in operation within five years from the passing of such Act, or, where the Parliament of Canada grants an extension of time for completion, within the time so granted; then the powers granted by such Act or by this Act shall cease and be null and void as respects so much of the railway or branch or extension, as the case may be, as then remains uncompleted. R.S., c. 37, s. 150. Am.

Commence-
ment.

Completion.

Section 150 of the Act of 1906 was as follows:

"If the construction of the railway is not commenced and fifteen per centum of the amount of the capital stock is not expended thereon within two years after the passing of the Act authorising the construction of the railway, or if the railway is not finished and put in operation within five years from the passing of such Act, then the powers granted by such Act or by this Act, shall cease and be null and void as respects so much of the railway as then remains uncompleted."

It will be noted that the section distinguishes between main line and branch line or extension; in the case of the former the fifteen per cent. is to be spent on survey, purchase of right of way and actual construction work, while in the case of "branches" or "extensions," the fifteen per cent. of the bond issue must, apparently, be expended on actual construction work, exclusive of survey and purchase of right of way.

A somewhat similar provision will be found in the English Tramways Act. 33 & 34 Vic., cap. 78, sec. 18, and under it it was held that "works" were not "substantially commenced" merely by purchasing land for the purpose of erecting a generating station or by giving an order for the execution of certain parts of the works; and it was further held that the "substantial commencement" of the works means the execution of physical works and not mere preliminary preparations: **Attorney-General v. Bournemouth Corporation** (1902), 2 Ch. 714; and see **Montreal, etc., Ry. Co. v. Chateauguay, etc., Ry. Co.**, 35 S.C.R. 48, and notes 4 C.R.C. 83; and therefore the defendants were restrained from commencing or continuing to construct the tramways authorised by their provisional order. Where, however, a railway thirteen days before the time limited for exercising its powers of expropriation entered on lands, it was held that the entry was proper and the land being **bona fide** required for the purposes of the railway, the defendants could not be restrained from entering even though they could not possibly complete their railway within the time limited: **Tiverton, etc., Ry. Co. v. Loosemore**, 9 A.C. 480; and where by an Act passed on August 9th, 1899, the powers of the company to take lands were to cease three years after its enactment, it was held that the three years did not expire until after August 9th, 1902: **Goldsmith's Company v. West Metropolitan Ry. Co.** (1904), 1 K.B. 1. As to powers at common law after such expiration, see **Midland Ry. Co. v. G.W. Ry. Co.** (1909), A.C. 445.

Where a railway company enters on land and its charter then expires, but is revived by a subsequent Act and all property previously acquired is vested in the revived company, the land which the company whose charter has expired had expropriated does not revert to the former owner or to the Crown, but remains sufficiently vested in the old company to permit of its conveyance to the company as revived: **Grand Junction Ry. Co. v. Midland**, 7 A.R. 681.

Where a railway company had surveyed and filed plans for one-third of its length and had done some construction work such as grading, blasting and felling trees, this was held to be sufficient evidence that the company had commenced operations within the meaning of its charter to prevent a forfeiture, and as the railway was authorised to construct in sections it was not bound before beginning work to file plans of the whole line: **Ontario, etc., Ry. Co. v. C.P.R.**, 14 O.R. 432.

In **Re Stratford, etc., Ry. Co. and Perth**, 38 U.C.R., 112, it was decided by a divided court that as the railway had not filed plans showing the whole of their route they could not exercise the powers conferred upon them by their charter. These cases are discussed in argument in **Yale Hotel Company v. Vancouver, etc., Ry. Co.** 3 C.R.C. 108.

Effect of Forfeiture. Failure to commence operations within the required time does not extinguish the claims of creditors against the shareholders in respect of unpaid stock due under sec. 93, *ante*: **Hughes v. Lalonde**, 18 R.L. 205; **Ray v. Blair**, 12 U.C.C.P. 257; **Port Dover, etc., Ry. Co. v. Grey**, 36 U.C.R., p. 425.

A forfeiture may be waived by the Legislature which may, by special enactment, either expressly or impliedly continue the charter: **Toronto v. Crookshank**, 4 U.C.R. 309; and see **Grand Junction Ry. Co. v. Midland**, 7 A.R. 681.

Where a company has failed to comply with the conditions precedent to beginning operations it has been held in Quebec that such non-compliance does not *ipso facto* operate as an extinction of the company nor a revocation of the charter as that can only be done at the suit of the Attorney-General and not by injunction or other proceeding taken by a private individual: **Roy v. La Compagnie, etc.**, 11 L.N. 359, 14 Q.L.R. 255; **Dominion Salvage Co. v. Attorney-General**, 21 S.C.R. 72; **Compagnie, etc., v. Rascony**, 20 L.C.J. 306; and the same rule has been laid down

for Ontario by the Supreme Court: **Hardy v. Pickerel, etc., Co.**, 29 S.C.R. 216. But see **Hodgins v. O'Hara**, 38 C.L.J. 81, a decision of Lount, J., in an insurance case to the contrary.

A company authorised by a Dominion Charter to construct and operate railways or tramways between certain points in the Province of Quebec, was held to be subject to the clauses of the Railway Act relating to the limitation of time for construction; **Montreal Park, etc., Ry. Co. v. Chateaugay, etc., Ry. Co.**, 4 C.R.C. 83, 35 S. C.R. 48.

A railway company which has allowed its powers as to construction to lapse by non-user, within the time limited in its charter and which does not own a railway within the limits of the municipality where such powers were granted, has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway, nor probably could an injunction be maintained against another company authorised to construct under article 479 of the Quebec Municipal Code, even though such powers had not been allowed to lapse; *ibid.* The question arose in this case as to whether a company whose powers to construct have lapsed could enter into an agreement with a municipality under article 479 of the Quebec Municipal Code. The court were not agreed and the point was not necessary for the decision of the case. It is submitted that such an agreement is competent as the Legislature can at any time waive the forfeiture. See also the cases collected in 4 C.R.C. at pp. 97-101.

General Powers.

By sec. 72, the powers granted by this Act are conferred only upon companies incorporated by Special Act; by sec. 150, sub-secs. 5, 6 and 7 where an individual purchases a railway or section of a railway he must apply for incorporation at the next session of Parliament. Sec. 162 also confers the powers granted therein upon the "company," which by sec. 2 (4), includes a person, and where not otherwise stated or implied means railway company, etc., *q.v.* The only authority conferred upon a person to do so is given by sec. 150, and then only subject to the limitations therein contained. Apart from statute a receiver might have power to construct or operate, but only so far as the court or the deed under which he acts gives that power to him, (see section 141, and notes), and presumably an individual and not a company might

be appointed under sections 155 and 158, to carry out a scheme of arrangement propounded by the directors of an insolvent company. Apart from these provisions the powers conferred by the Act can only be exercised by a corporation and not by individuals who, while they might build and operate a railway, would not have any of the rights, privileges or immunities granted by this statute and their liability would depend upon the common law. They would thus have no power to enter on or injure the lands of others and would be liable for all damages caused by them in the nature of a nuisance or a trespass, whether they had been guilty of negligence or not. The result is that for all practical purposes no one but a corporation can build or operate a railway in Canada, nor can one railway exercise the powers conferred upon another unless the latter's charter powers have been conferred upon the former by statute: **Yale Hotel Co. v. Vancouver, etc., Ry. Co.**, 3 C.R.C. 108; and therefore a railway which has performed work and spent money upon the construction and operation of another's line without authority cannot recover for their value: **Great Western Ry. Co. v. Preston, etc., Ry. Co.**, 17 U.C.R. 477. And so a railway company which runs its trains over another's line without authority would not be entitled to the protection of the statute and would be liable at common law for all damages which it caused to others in the course of its unwarranted occupation and operation: **Wealleans v. Canada Southern Ry. Co.**, 21 A.R. 297. Reversed upon the facts: **Michigan Central Ry. Co. v. Wealleans**, 24 S.C.R. 309, and see the remarks of Earl Cairns in **Gardner v. London, etc., Ry. Co.**, L.R. 2 Ch. at p. 212 quoted, 2 C.R.C. 259.

Subject, however, to the limitations about to be mentioned a company which carries on the operations which are expressly authorised by its act of incorporation with due diligence and without negligence is not liable in an action for any damages which naturally flow from performance of the works which it is authorised to execute: **C.P.R. v. Roy**, 1 C.R.C. 196, following **Geddis v. Bann Reservoir**, 3 A.C. 430, and **Hammersmith Ry. Co. v. Brand**, L. R. 4, H.L. 171, and the previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute: **C.P.R. v. Roy**, *supra*. This view had been combatted in the Province of Quebec where it had been held notwithstanding the powers conferred upon railways by the Railway Act, 51 Vic., cap. 29 (D.), a railway company was liable under the civil law in force in Quebec though they carried out

the works authorised by statute without any negligence on their part. See 1 C.R.C. 170 and notes, 2 C.R.C., pp. 303-305, but by the decision of the Privy Council, *supra*, the law laid down for the Province of Quebec is now the same as in the other Provinces and in England. Similarly railway companies to which the Act 51 vic, cap. 29, applied being authorised by law to carry cattle and as a necessary incident thereto to maintain pens for herding them are not liable if in the ordinary exercise of their powers they create a nuisance: **Bennett v. G.T.R.**, 1 C.R.C. 451, following **London, etc., Ry. Co. v. Truman**, 11 A.C. 45; see also **Bessette v. C.P.R.**, 24 C.R.C. 113; nor were they prior to the Act of 1903 liable for fires set out by their locomotives unless some negligence on their part could be shown: **C.P.R. v. Roy**, *supra*, and cases cited in notes 1 C.R.C. 208, *et seq.*, but section 387, *infra*, has altered the law in this particular, though in other respects it is still the law in the case of railway companies that all injuries resulting from the proper operation of the company under their powers expressly or impliedly granted them by statute are deemed to be included in the compensation granted under the terms of the statute and must be recovered under its provisions nor can they be made the subject of an independent action: **Powell v. Toronto, etc., Ry. Co.**, 25 A.R. 209; **Hammersmith v. Brand**, L.R. 4, H.L. 171; **Brodeur v. Roxton Falls** 11 R.L. 447; and if a contractor is building part of the line for the railway and necessarily causes damages he may claim the benefit of the statute: **Hendrie v. Onderdonk**, 34 C.L.J. 414. The following are additional instances of the application of this principle: Temporary inconvenience caused to land owners during construction: **Hendrie v. Onderdonk**, *supra*. Vibration caused by railway trains passing along an adjoining highway: **Powell v. Toronto, etc., Ry. Co.**, *supra*; the laying of street railway tracks closer to one side of the street than the other: **Attorney-General v. Montreal Street R.W. Co.**, 1 L.N. 580; the escape of electricity from the tracks of a street railway company, causing injury to the operations of a telephone company where that is a natural incident to operations legalized by statute: **Eastern, etc., Ry. Co. v. Cape Town Telephone Co.** (1902), A.C. 381; but the "power" to do a particular thing as, for instance, to construct a railway, does not justify the undertakers (to use a general word) in doing that thing so as to cause a nuisance unless by express language or necessary implication that is stated or must be inferred: **Shelfer v. City of London, etc., Co.** (1895), 1 Ch. 287, at p. 296; see **National Telephone Co.**

v. Baker (1893), 2 Ch. 186; and so any company is always liable where fires were set by its locomotives and negligence or defective appliances could be proved: **Rainville v. G.T.R.**, 1 C.R.C. 113, and other cases reported and cited, *ibid.* So also an interference with ancient lights or causing a subsidence of the soil is not expressly or impliedly authorised and damages therefor can be recovered: **Jordeson v. Sutton** (1899), 2 Ch. 217, and vibration caused by the operation of heavy machinery in a power house: **Hopkin v. Hamilton Electric Light Co.**, 2 O.L.R. 240, 4 O.L.R. 258; and the privileges conferred by its charter upon a street railway company for the construction and operation of its railway upon the public streets do not relieve it from damages to the owners of property adjoining its power house arising from smoke, noise and vibration in so far as they depreciate the rental or selling value of the property: **Gareau v. Montreal Street Ry. Co.**, 2 C.R.C. 297; and a railway company has no right to allow smoke to escape for a longer time than is absolutely necessary: **South Eastern Ry. Co. v. London County Council**, 84 L.T. 632; and any careless, oppressive or arbitrary exercise of its statutory powers will render the company liable to an action for damages: **Sutton v. Clarke**, 6 Taunton, 34; **East Freemantle v. Annis** (1902) A.C. 213 and where work is carried on night and day to the discomfort of adjoining owners, that being an admittedly unreasonable exercise of its powers, it will be restrained: **Roberts v. Charing Cross, etc., Ry.**, 87 L.T. 732, 19 T.L.R. 160. So also where work is entered upon before parliamentary powers are actually granted the company takes the risk of liability for all damages which may be caused thereby: **Ash. v. Great Northern Ry. Co.**, 19 T.L.R. 639, and an escape of electricity due to a failure to exercise the high degree of care, skill and foresight required of persons engaging in operations of a dangerous nature is actionable negligence notwithstanding the existence of a statute authorising the use of electricity: **Royal Electric Co. v. Heve**, 32 S.C.R. 462. There is said to be a distinction between the powers conferred upon the municipality and those conferred upon a railway company respectively to expropriate property, as the former exists for the public good and the latter is primarily a commercial enterprise and therefore it is said that their charters should be more rigidly construed: **Harding v. Township of Cardiff**, 29 Gr. 308.

The cases dealing with the various classes of powers conferred upon railways will be found referred to under other appropriate sections.

Powers of
company.

162. (1) The company may, for the purpose of the undertaking, subject to the provisions in this and the Special Act contained,—

For the purposes of the undertaking a company may exercise its statutory powers though the result may be to deprive the owners of property of a mine which is upon their lands, but if it could be shown that the company were acquiring the land not for the purposes for which the powers were given, but for some collateral object as, for instance, to sell at a profit, the exercise of its powers for such a purpose would be restrained: **Jenkins v. Central Ontario Ry. Co.**, 4 O.R. 593. And the court may always control the powers of a railway company when exercised for some colorable purpose: **Galloway v. London**, L.R. 1 H.L. 34; **Eversfield v. Midsussex Ry. Co.**, 3 De.G. & J. 286; **Dodd v. Salisbury Ry. Co.**, 5 Jur. N.S. 783; **Carington v. Wycombe R.W. Co.**, L.R. 3 Ch. 377. As was said by Lord Cairns in **Richmond v. North London Ry. Co.**, L.R. 3 Ch. at p. 681, "One of the best established objects of the jurisdiction of this court is to take care that companies exercising powers under their acts shall not exercise them otherwise than for the purpose of the act." This was quoted and followed in **Nihan v. St. Catharines, etc., Ry. Co.**, 16 O.R. 459, at p. 473. See also **Re Watson and Northern Ry. Co.**, 5 O.R. 550.

The term "undertaking" used in this paragraph is defined sec. 2 (35).

Entry upon
lands.

(a) enter into and upon any Crown lands without previous license therefor, or into and upon the lands of any person whomsoever, lying in the intended route or line of the railway, and make surveys, examinations or other necessary arrangements on such lands for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway;

Surveys.

Formerly 151 (a). This section relates only to preliminary surveys and staking out of the land. Where a company desires to take, use or occupy Crown lands, sections 189 to 192, would govern, and a previous license to do so would have to be obtained; similarly where the company desires to occupy the lands of individuals, sections 199 to 202, would apply and necessary notices must be given and a warrant for immediate possession obtained if that is required.

(b) receive, take and hold, all voluntary grants and donations of lands or other property or any bonus of money or debentures, or other benefit of any sort, made to it for the purpose of aiding in the construction, maintenance and accommodation of the railway; but the same shall be held and used for the purpose of such grants or donations only;

Receive
grants and
bonuses.

Formerly 151 (b). Where lands belonging to the Dominion of Canada are given by way of subsidy to a railway company that company takes the lands subject to all the conditions set out in the Dominion Lands Acts, so far as they can be made applicable to railways, whether those conditions appear in the patent to the company or not: **Calgary, etc., Ry. Co. v. The King**, 8 Ex. C. R. 83, 33 S.C.R. 673. This case was appealed to the Privy Council (1904), A.C. 765, where it was held that a reservation of "Mines and Minerals" only included gold and silver.

Lands granted as subsidies are in a different position from lands granted for right of way and other railway purposes. They are to be regarded in the same light as cash bonuses and the Board will not treat them, for example, in a proceeding under sec. 193, *infra*, as ordinary right of way. **Montreal Tramway v. Lachine etc., Ry. Co.**, 50 S.C.R. 84 at p. 92, 18 C.R.C. 122, **South Ontario Pacific Ry. Co. v. G.T.R.** (Junction Cut Case), 20 C.R.C. 152, **C.P.R. v. G.T.P.**, 21 C.R.C. 95

Donations. "Mere donations are sometimes highly beneficial to the donors and frequently the construction of a line of railways will give value to estates which till then were almost valueless," Girouard, J.: **Quebec, etc., Ry. Co. v. Gibsone**, 29 S.C.R. 340, at p. 358. But where there is a covenant on the part of a railway company to locate its line through the lands conveyed that covenant in itself takes the grant out of the category of donations and makes it a conveyance for value, *ibid.* Where a grant of lands or payment of a bonus is made to a railway company in consideration of covenants by the latter to undertake certain works or operate or maintain its line in a specific manner, difficult questions arise as to how far such covenants can be afterwards enforced against the company. See this subject discussed in 1 C. R.C., pp. 289 to 297, where a number of Canadian decisions are quoted.

Parties who purchase bonds of a railway company under an agreement by the company to complete and

operate the line may recover, as damages for breach, the loss of benefits which would have accrued to them from construction: **Wood v. Grand Valley Ry. Co.**, 16 C.R.C. 220, 10 D.L.R. 726, 27 O.L.R. 556.

Acquire
property.

(c) purchase, take and hold of and from any person, any lands or other property necessary for the construction, maintenance and operation of the railway, and also alienate, sell or dispose of, any lands or property of the company which for any reason have become not necessary for the purposes of the railway;

Dispose of
property not
required.

Under this sub-section, formerly section 151 (c), the railway company may expropriate the lands of municipalities. **In re G.T.R. and Cities of Ste. Henri & Ste. Cunegonde**, 4 C.R.C. 277, and see notes sec. 200.

Placing of
railway.

(d) make, carry or place the railway across or upon the lands of any person on the located line of the railway;

Formerly section 151 (d). Compare 8 Vic., cap. 18, sec. 6 (Imp.). See also notes to secs. 167 to 233.

When lands have been acquired for the purposes of the company they become impressed with a trust in favor of the public and can be used only for railway purposes unless they afterwards, for any reason, fall within the description of "superfluous lands" as they are known in England (8 Vic., cap. 18, sec. 127 (Imp.)), when under the provisions of the latter part of this sub-section they may be sold or disposed of: **G.T.R. v. Valliear**, 2 C.R.C. 245, 3 C.R.C. 399, but without such express powers a railway company cannot sell or alienate its lands: **Mul-liner v. Midland Ry.**, 11 Ch. D. 611; **Pratt v. G.T.R.**, 8 O.R. 499; and generally it is for the railway company, when its good faith is not attacked, to determine whether lands owned by it are superfluous or not, but this rule does not apply where an execution creditor is trying to realize an execution against the company's lands not required for the purposes of its railway: **Erie, etc., Ry. v. Great Western Ry.**, 19 Gr. 43; and a railway company has no greater power to grant an easement in the nature of a farm crossing or a right of way over, or the right to lay a sewer under its premises than it has to convey the lands themselves: **Guthrie v. C.P.R.**, 1 C.R.C. 1; **C.P.R. v. Guthrie**, 1 C.R.C. 9; **G.T.R. v. Valliear, supra**; **Canada Southern Ry. v. Niagara Falls**, 22 O.R. 41. And the same cases show that where the right to an easement depends upon the presumption of a lost grant no

such easement can be acquired over railway lands which are in use for the general purposes of the company. See also **Great Western Ry. v. Talbot** (1902), 2 Ch. 759.

But see the notes on farm crossings under sections 272 and 273, *infra*.

The question whether lands have become "superfluous" within the meaning of the English Act cited above is a question of mixed law and fact to be determined upon each case as it arises: **Macfie v. Callander, etc., Ry. Co.** (1898), A.C. 270. For other English decisions upon this subject see Browne & Theobald, 4th Edition, pp. 243 to 245.

(e) cross any railway, or join the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purposes of such connection;

Cross and connect with other railways.

Formerly section 151 (e). See sections 193, 252 to 254, 312, *infra*, and notes.

(f) make, complete, operate, alter and maintain the railway with one or more sets of rails or tracks, to be worked by the force and power of steam, electricity, or of the atmosphere, or by mechanical power, or any combination of them;

Construct, and operate railways.

Formerly section 151 (f).

After approval of route map the Company is free to arrange, re-arrange and re-locate freight tracks and sidings upon its property without approval as to their location, but this is subject to the powers of the Board as to suitable accommodation for traffic. **Re Great Northern Ry. Co.'s. Sidings**, 23 C.R.C. 5.

(g) construct, erect and maintain all necessary and convenient roads, buildings, stations, depots, wharfs, docks, elevators, and other structures, and construct, purchase and acquire stationary or locomotive engines, rolling stock, and other apparatus necessary for the accommodation and use of the traffic and business of the railway;

Buildings, equipment, etc.

Formerly section 151 (g).

For notes upon the erection of stations see sec. 188, *post*.

(h) make branch railways, and manage the same, and for that purpose exercise all the powers, privileges

Branch railways.

and authority necessary therefor, in as full and ample a manner as for the railway;

Formerly section 151 (h). Before the Act of 1903 this sub-section in the Act of 1888 read as follows: "Make branch railways if required and provided for by this or the Special Act and manage," etc. By sections 121 and 122 of the Act of 1888, there was power to make branch railways for the purposes therein mentioned and these sections now appear with various amendments as sections 180 to 185. The cases upon this subject will be found in the notes to those sections. For the English provisions upon this subject, compare 5 and 6 Vic., cap. 55, sec. 12, and 8 Vic., cap. 20, sec. 76. The latter empowering the owners of land adjoining the railway to make branch lines to it.

Transport
passengers
and freight.

(i) take, transport, carry and convey persons and goods on the railway, regulate the time and manner in which the same shall be transported, and the tolls to be charged therefor;

Formerly section 151 (i). Compare 8 Vic., cap. 20, sec. 86 (Imp.). The conditions under which passengers and goods are to be carried are laid down in sections 234 to 246, and the provisions as to tolls in sections 312 to 356. "Toll" is defined by section 2 (32).

Remove
trees.

(j) fell or remove any trees which stand within one hundred feet from either side of the right of way of the railway, or which are liable to fall across any railway track;

Formerly 151 (j). The damages which flow from the exercise of this right should be the subject of compensation and arbitration under the act. The owner has no right of action in the courts for the value of trees cut down: **Evans v. Atlantic, etc., Ry. Co.**, M.L.R., 6 S.C. 493, but the right to cut trees is distinct from the right to take land and if a company wishes to exercise such right they should serve a distinct notice and offer compensation therefor, and if no such notice is given, arbitrators in fixing damages for taking land cannot allow in addition damages for the possibility that the owner's trees may be cut down: **Re Ontario, etc., Ry. Co. v. Taylor**, 6 O.R. 338. Where trees are cut down by a railway company in exercise of this right the timber belongs to it; subject always to the liability to pay the true owner compensation therefor under the Act; but if instead of proceeding un-

der the expropriation clauses of the statute the owner sues the company for the damages, his action will be barred after one year under sec. 391, sub-sec. 1: **McArthur v. Northern, etc., Ry. Co.**, 15 O.R. 733, 17 A.R. 86. **Lumsden v. Temiskabing & Northern Ontario Ry. Commission et al.**, 7 C.R.C. 156, 15 O.L.R. 469.

(k) make or construct in, upon, across, under or over any railway, tramway, river, stream, watercourse, canal, or highway, which it intersects or touches, temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fences;

Make tunnels and other works.

Formerly section 151 (k). Compare 8 Vic., cap. 20, sec. 16 (Imp.). As to crossing railways and tramways see sub-section (e), *ante* and sections 193, 252 to 254, 312; for crossing rivers, streams, watercourses or canals see sections 245 to 249, *infra*; for crossing highways, sections 255 to 267; for drainage works, sections 268 to 270; for fences, sections 274, 275 and 406; bridges, tunnels, and other structures, 249 to 251.

(l) divert or alter, as well temporarily as permanently, the course of any such river, stream, watercourse or highway, or raise or sink the level thereof, in order the more conveniently to carry the same over, under or by the side of the railway;

Divert highways and waterways.

Formerly sec. 151 (l). Compare 8 Vic., cap. 20, sec. 16 (Imp.). For cases in which a highway may be diverted see notes to sections 256, *infra*, or a waterway, sections 245, 269 to 271.

(m) make drains or conduits into, through or under any lands **adjoining** the railway, for the purpose of conveying water from or to the railway; For meaning of **adjoining** see **Murphy v C.P.R.**, 5 C.R.C. 477.

Construct drains.

Formerly sec. 151 (m). Compare 8 Vic., cap. 20, sec. 16 (Imp.). See sec. 202, *infra*, for method of obtaining water required by the railway.

(n) divert or alter the position of any water-pipe, gas-pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles;

Divert drains, pipes and wires.

Formerly section 151 (n). Before the Act of 1903, the words "electric lines, wires or poles" were "electric

light, wire or pole." The meaning of "electric lines," in this connection does not seem to be quite clear. It would almost seem to confer power to divert or alter the position of an electric railway track.

Telegraph,
etc.

(o) construct, acquire and use telegraph, telephone or electric lines and plant;

Formerly section 151 (o). The section originally read "Construct or acquire electric, telegraph and telephone lines **for the purposes of its undertaking.**" The words in heavy type having been left out it might be argued that a railway is not now restricted in the construction of works of this character to cases where it is necessary for or cognate to the main object of its incorporation, but by section 367, *infra*, it is expressly provided that the company may construct and operate telegraph and telephone lines upon its railway **for the purposes of its undertaking**; so that in this sub-section the former limitation is preserved in effect. See also notes to sub-sec. (q), *infra*, and to sections 367 to 373.

Alter and
substitute
other works

(p) from time to time alter, repair or discontinue the works hereinbefore mentioned, or any of them, and substitute others in their stead;

Formerly section 151 (p). Compare 8 Vic., cap. 20, sec. 86 (Imp.).

The powers granted by this clause are not limited to the time granted by the Special Act or Railway Act for the construction of the railway, and so they may alter and repair old works, or substitute new works for them after the time limited for originally constructing those works has expired: *Elmsley v. North Eastern Ry. Co.* (1896), 1 Ch. 418. On the general subject of repairs see sections 283, 284, and 410.

Other
necessary
acts.

and (q) do all other acts necessary for the construction, maintenance and operation of the railway. R.S., c. 37, sec. 151.

Formerly section 151 (q). Compare 8 Vic., cap. 20, sec. 16 (Imp.). It has been held in England that a similar provision limited a railway company in the exercise of the powers granted by this section to cases in which the proposed works were actually necessary for the "construction, maintenance and operation" of the railway, and the mere fact that works not in terms authorised might save expense to the company is no ground for allowing the latter to execute them and so a railway which

had no express power to divert a highway was not allowed to do so on the ground that that course was much cheaper than running their line above or below it: **Queen v. Wycombe Ry. Co.**, L.R. 2 Q.B. 310, see pp. 320 and 325; nor was a railway company allowed to build a mortar mill on their land, thereby causing a nuisance though thereby they could execute their works more economically: **Fenwick v. East London Ry. Co.**, 20 Eq. 544, at p. 549 and 551. This case was explained in **Harrison v. Southwark, etc., Co.** (1891), 2 Ch. 409, and it and **Queen v. Wycombe Ry. Co.**, *supra*, were followed with reluctance by Fry, J., in **Pugh v. Golden Valley Ry. Co.**, 12 Ch. D. 274, 15 Ch. D. 330, quoting Jessel, M.R., in **Fenwick v. East London Ry. Co.**, *supra*, at p. 551, as follows: "I think the case is concluded by the authorities (I should have thought it would have been by good sense without authority) that you cannot damage your neighbor's property merely for the purpose of saving yourself a little money where it is unnecessary for the construction of the railway"; but whether works are "necessary for the construction" of the railway or not is not a question for the land owner to decide, and so where a company in order to prevent access to the plaintiff's land being completely blocked took land of theirs against their will for the purpose of diverting a highway thereby diminishing the obstruction, it was held that the company was entitled to do so: **Dowling v. Pontypool, etc., Ry. Co.**, 18 Eq. 714.

(2) The tracks of every railway, the construction of which is hereafter commenced, shall be of the standard gauge of four feet eight and one half inches, unless otherwise permitted by the Board. **New.**

This width is the standard gauge of all railways on the North American Continent and in England. Until about forty years ago there were narrow gauge railways, three and one half feet wide, such as the Toronto, Grey and Bruce, and the Toronto and Nipissing Rys. and a broad gauge railway, such as the Great Western Ry., five and one half feet wide, in Canada. A uniform gauge is necessary for the interchange of traffic between connecting railways as required by sec, 312, *et seq.*

163. The company shall restore, as nearly as possible, to its former state, any river, stream, watercourse, highway, water-pipe, gas-pipe, sewer or drain, or any telegraph, telephone or electric line, wire or pole, which it diverts or alters, or it shall put the same in such a state

Diversions and alterations, to be made good.

as not materially to impair the usefulness thereof. R.S., c. 37, s. 154.

Identical with section 154 of the Act of 1906 which was the same as section 119 of the Act of 1903 except that "line" substituted for "lines" in the fourth line.

Damage.

164. The company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers. R.S., c. 37, s. 155.

Compensation.

This section was first introduced into the Railway Act of 1888, as section 92, and according to the view of the late Chief Justice Armour in **Re Birely and Toronto, etc., Ry. Co.**, 28 O.R., 468, its introduction had an important bearing upon the liability of railway companies to pay compensation under the act for damages to property caused by the exercise of their powers. The rules upon which compensation for lands taken and lands injuriously affected should be based had been the subject of much discussion, both in England and Canada for many years, and while the wording of English and Canadian statutes was different the rules adopted prior to this enactment in 1888 were substantially the same.

A statement of their effect will be found in the notes to section 221, **post**, and is submitted as being substantially accurate.

From the fact that section 92 of the Act of 1888 corresponding with this section was general in its terms and followed a clause conferring powers of operation as well as expropriation and construction, Armour, C.J., decided that compensation should be allowed for injuries arising from the operation of the railway even though no lands had been taken: **Re Birely and Toronto, supra**, in which an appeal was quashed, 25 A.R. 28; but the point was again brought up in **Powell v. Toronto, etc., Ry. Co.**, 25 A.R. 209, where the **Birely Case** was referred to and it was held that notwithstanding the introduction of section 92 no compensation could be allowed to the owner of land fronting on a street along which a railway had been constructed, for damages from the operation of the railway, as compensation for lands injuriously affected must be based on injury or damage to the land itself and not on personal inconvenience or discomfort to the owner or occupant. The Court of Appeal did not follow the **Birely**

Case nor adopt the rule of construction laid down by Armour, C.J., in his judgment. After the case of **G.T.P. v. Fort William**, 43 S.C.R. 412, was decided, section 235 (now section 255) was amended in 1911 by cap. 22, sec. 6, so as to give the Board power in certain cases to award compensation to adjacent or abutting land owners where the railway is authorised to cross a highway, even though no land is taken; see **G.T.P. v. Land Owners of Fort William**, (1912), A.C. 224, reversing the decision of the Supreme Court. To the extent covered by section 255, the rule that compensation is not given for damages resulting from operation, as distinguished from construction, when no land taken, must now be taken as modified, but not in other cases: **Holditch v. C.N.O.R.** (1916), 1 A.C. 536. The subject of compensation under the Government Railways Act, R.S.C., cap. 39, sec. 3 (e), which is different in its terms, has been fully considered in **Vezina v. The Queen**, 17 S.C.R. 1. The subject is further dealt with under sections 199, *et seq.*, but the following recent cases may be usefully consulted: **Huot v. Quebec, etc., R.W. Co.**, Q.R. 10 S.C. 373; **Queen v. Robinson**, 4 Ex. C.R. 439; 25 S.C.R. 692; **Manchester, etc., Ry. Co. v. Anderson** (1898), 2 Ch. 394; **Dickson v. Chateauguay, etc., R.W. Co.**, Q.R. 17 S.C. 170; **Chateauguay, etc., Ry. Co. v. Trenholme**, Q.R. 11 Q.B. 45; **The King v. Sedger**, 7 Ex. C.R. 274; **McQuade v. The King**, *ibid.*, 318; **Todd v. Meaford**, 3 C.R.C. 375; 6 O.L.R. 469; **Re Medler & Toronto**, 4 C.R. C. 13; **Re McDonald & Toronto, etc., Ry.**, 2 O.W.R. 723; **Re McQuesten & Toronto, etc., Ry. Co.**, *ibid.*, 721. And see **Dodge v. The King**, 38 S.C.R. 149, at p. 155, for a re-statement of the principles upon which compensation should be fixed.

The company must, however, take the proper steps by giving notice of expropriation and obtaining a warrant for possession before entering upon the lands required, otherwise they are trespassers and liable in damages as such. **Inverness Ry., etc., Co. v. McIsaac**, 6 C.R. C. 121, 37 S.C.R. 134; **Dominion Iron and Steel Co. v. Burt**, 20 C.R.C. 134; 33 D.L.R. 425; (1917), A.C. 179.

165. Any company operating a railway from any point in Canada to any point on the international boundary line may exercise, beyond such boundary, in so far as permitted by the laws there in force, the powers which it may exercise in Canada. R.S., c. 37, s. 156.

Exercise of
powers in
United
States.

In **Macdonald v. G.T.R.**, 31 O.R., 663, at p. 665, Meredith, C.J., said, "The Railway Act is in my opinion not ap-

plicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada" and, accordingly, in that case he held that the restrictions imposed upon contracts under what is now sec. 312 (7), did not apply to contracts which were being performed by or to the working of a railway in the United States.

Commencement of Works.

Require-
ments before
works com-
menced.

166. The company shall not, except as in this Act otherwise provided, commence the construction of the railway, or any section or portion thereof, until the general location has been approved by the Board as hereinafter provided, nor until the plan, profile and book of reference have been sanctioned by and deposited with the Board and duly certified copies thereof deposited with the registrars of deeds, in accordance with the provisions of this Act. R.S., c. 37, s. 168 (1). Am.

Formerly sub-section 1 of section 168, which read as follows: "The company shall not commence the construction of the railway, or any section or portion thereof, until the plan, profile and book of reference has been submitted to and sanctioned by the Board as hereinbefore provided, nor until such plan, profile and book of reference so sanctioned has been deposited with the Board, and duly certified copies thereof with the registrars of deeds, in accordance with the provisions of this Act."

Location of Line.

Map.

Contents.

167. (1) The company shall prepare, and submit to the Board, in duplicate, a map showing the general location of the proposed line of the railway, the termini and the principal towns and places through which the railway is to pass, giving the names thereof, the railways, navigable streams and tide-waters, if any, to be crossed by the railway, and such as may be within a radius of thirty miles of the proposed railway, and, generally, the physical features of the country through which the railway is to be constructed, and shall give such further or other information as the Board may require.

Scale.

(2) Such map shall be prepared upon a scale not smaller than six miles to the inch, or upon such other appropriate scale as the Board may determine, and shall

be accompanied by an application in duplicate, stating the Special Act authorising the construction of such railway, and requesting the Board's approval of the general location as shown on the said map. Application.

(3) The Board may approve such map and location, or any portion thereof, or may make or require such changes and alterations therein as it deems expedient. Approval of Board.

(4) Where the Board approves the whole or any portion of such map and location such approval shall be signified upon the map and the duplicate thereof accordingly. Board may approve whole or portion.

(5) The map when so approved and the application shall be filed in the Department of Railways and Canals and the duplicate thereof with the Board. Filing.

(6) The provisions of this section shall only apply to the main line, and to branch lines over six miles in length. R.S., c. 37, s. 157. Am. Application of section.

Former section 157 amended, by substituting "Board" for "Minister" throughout. Sub-sections (3) and (4) correspond to former sub-sections (3) and (5), but the changes seem to be merely clerical.

Plan, Profile and Book of Reference.

168. (1) Upon compliance with the provisions of the last preceding section, the company shall make a plan, profile and book of reference of the railway. Plan, profile and book of reference.

(2) The plan shall show,— Plan.

(a) the right of way, with lengths of sections in miles;

(b) the names of terminal points;

(c) the station grounds;

(d) the property lines and owners' names;

(e) the areas and length and width of lands proposed to be taken, in figures, stating every change of width; or other accurate description thereof;

(f) the bearings; and,

(g) all open drains, watercourses, highways and railways proposed to be crossed or affected.

(3) The profile shall show the grades, curves, highway and railway crossings, open drains and watercourses. Profile.

Book of
reference.

(4) The book of reference shall describe the portion of land proposed to be taken in each lot to be traversed, giving numbers of the lots, and the area, length and width of the portion of each lot proposed to be taken, and names of owners and occupiers so far as they can be ascertained.

Further in-
formation.

(5) The Board may require any additional information for the proper understanding of the plan and profile.

Sections.

(6) The plan, profile and book of reference may be of a section or sections of the railway.

Quebec.

(7) In the province of Quebec the portion of the railway comprised in each municipality shall be indicated on the plan, and in the book of reference, by separate number or numbers. R.S., c. 37, s. 158. Am.

Former section 158 amended. The words "or other accurate description thereof" in subsection (e) are new.

Plans and
profiles, how
prepared.

169. (1) All plans and profiles required by law to be deposited by the company with the Board, shall be drawn to such scale, with such detail, upon such materials, and shall be of such character, as the Board may, either by general regulation, or in any case, require, or sanction.

Certifica-
tion.

(2) All such plans and profiles shall be certified and signed by the president or vice-president or general manager, and also by the engineer of the company.

Book of
reference.

(3) Any book of reference, required to be so deposited, shall be prepared to the satisfaction of the Board.

Board may
refuse
sanction.

(4) Unless and until such plan, profile and book of reference are so made satisfactory to the Board, the Board may refuse to sanction the same, or to allow the same to be deposited with the Board. R.S., c. 37, s. 165.

Former section 165 amended by substituting "regulation" for "regulations" in sub-sec. (1) and "are" for "is" in the second line of sub-sec. (4).

Sanction
by Board.

170. (1) Such plan, profile and book of reference shall be submitted to the Board which, if satisfied therewith, may sanction the same.

Effect.

(2) The Board by such sanction shall be deemed to have approved merely the location of the railway and the

grades and curves thereof, as shown in such plan, profile and book of reference, but not to have relieved the company from otherwise complying with this Act.

(3) The Board upon the application of the company may sanction a deviation of not more than one mile from any one point as shown on the general location approved by the Board, and any such deviation shall be shown upon the general location plan filed with the Department of Railways and Canals, and upon the duplicate thereof filed with the Board.

Board may
sanction
deviation of
one mile.

(4) Before sanctioning any plan, profile or book of reference of a section of a railway, the Board may require the company to submit the plan, profile and book of reference of the whole or of any portion of the remainder of the railway or such further or other information as the Board may deem expedient. R.S., c. 37, s. 159 (1)—(4). Am.

Further
information.

Former section 159 amended by substituting "plan" for "plans" in sub-sec (1) and sub-sec. (3), giving the Board an unfettered right to sanction a deviation of not more than one mile. This section was amended by 1-2 Geo. V., cap. 22, sec. 4, but that amendment now appears as section 171 with amendments. Section 159 formerly followed section 158, the present section 168. In spite of the interjection of section 169, the words "such plan, etc," appear to refer to section 168.

The Board has no jurisdiction to grant approval of works done in contravention of the Railway Act, except those constructed before December 31st, 1909 (9-10 Geo. V., cap. 50, sec. 2). This section as amended now appears as sec. 40, giving the Board power to approve any unauthorised work upon such terms and conditions as the Board may impose. See **In re Prince Rupert Location—G.T.P. Ry. Co.**, 13 C.R.C. 153, 21 W.L.R. 650.

To the extent necessary to give effect to the purposes of Dominion incorporation the Board has jurisdiction under the Railway Act to authorise the expropriation by a Dominion railway company of lands of a Provincial railway company; either by an order approving a location plan under this section, which carries with it the right to expropriate lands within the limits set by section 199 or in a proper case by order, under sec. 200; **Lachine**,

etc., Ry. Co. v. Montreal, etc., Ry. Cos., 18 C.R.C. 133. But a Provincial railway company has not corresponding rights with respect to the lands of a Dominion railway company: **Attorney-General for Alberta v. Attorney-General for Canada**; 19 C.R.C. 153; (1915), A.C. 363; 22 D.L.R. 501. Similarly lands dedicated to a public use under a Provincial statute may be expropriated for railway purposes under the Railway Act: **Lachine, etc., Ry. Co. vs. Montreal Gas Co.**, 18 C.R.C. 438; 28 D.L.R. 382. But this section has no application to the lands of a Provincial railway on an application under section 193: **Lachine, etc., Ry. Co. v. Montreal, etc., Ry. Co.**, *supra*.

The date of the sanctioning of the location under this section has often been appealed to as settling the question of seniority on an application under sections 252 and 253. But the mere approval by the Board of the plans filed with it does not necessarily give seniority to the plans first approved. This section defines the effect of approval or sanction, *i.e.*, it merely gives approval of the location of the railway and the grades and curves thereof, but does not relieve the company from otherwise complying with the Act: **C.N. Ry. Co. v. C.P.R.** (Kaiser Crossing Case), 7 C.R.C. 297. A railway in actual occupation with an existing work upon the ground, with the ownership of the fee at the point of crossing has much stronger claims to seniority than the railway which has merely obtained a prior sanction of its plans, *ibid*. It seems to be definitely settled that construction and not approval of location gives priority: **G.T.R. v. C.P.R.** (Nokomis Crossing Case) 7 C.R.C. 299; **C.N.R. v. C.P.R.**, 11 C.R.C. 432; **Midland Ry. Co. of Manitoba v. G.T.P. Ry. Co.**, 23 C.R.C. 80 and cases there collected. But see **Essex Terminal Co. v. Windsor etc., Ry. Co.**, 8 C.R.C. 1; 40 S.C.R. 620, where it was held that priority either of sanction or construction was a matter for the discretion of the Board when determining seniority. Ownership of the land upon which a crossing is constructed is an important element in determining the question of seniority: **G.T.R. v. United, etc., Ry. Co.** (St. Hyacinthe Crossing Case), 7 C.R.C. 294; **Erie, etc., Ry. Co. v. Niagara, etc., Ry. Co.**, 18 C.R.C. 29 and see **Midland Ry. Co. of Manitoba v. G.T.P. Ry. Co.**, 23 C.R.C. at pp. 82 and 88.

Where a railway company has a right under its charter to construct one or more sets of tracks, and has gained seniority, it retains this seniority as to sets of tracks subsequently built across the junior railway: **G.T.R. v. United, etc., Ry. Co.** (St. Hyacinthe Crossing Case), 7 C.

R.C. 294; and also when it changes its location, **Hamilton v. Hamilton, etc., and T. H. and B. Ry. Cos.** (Birch Avenue Extension Case), 19 C.R.C. 290. The rule as to senior and junior railways at crossings has no application to steam railways crossed by municipally owned street railways running on the highways of the municipalities: **Edmonton v. G.T.P. and C.N. Ry. Cos.**, (Syndicate Avenue Crossing Case), 15 C.R.C. 443; **Brantford v. G.T.R.**, 20 C.R.C. 166; **G.T.P. Ry. Co. v. Edmonton**, 15 C.R.C. 445, following **Edmonton v. G.T.P. Ry. Co.**, 14 C.R.C. 93, 4 D.L.R. 472. And see notes to sections 252 and 253.

As to the question of seniority between highways and steam railways, where a plan shewing a highway has been registered prior to the sanction of the location of a railway, the highway is senior: **Edmonton v. Edmonton, etc, Ry. Co.**, 13 C.R.C. 128. *Aliter*, when the plan is registered after sanction of location: **City of Regina v. C.P. R.**, 16 C.R.C. 238.

171. (1) In granting any such sanction, or in giving leave under any provision of this Act to take lands without the consent of the owner, the Board may fix a period,—

Board may
fix time for
acquiring
land.

- (a) within which the company must acquire the lands or take the necessary steps for such purpose; or
- (b) within which the notice mentioned in section two hundred and fifteen shall be conclusively deemed to have been given.

(2) In the event of the order granting such sanction or leave, whether made before or after the passing of this Act, providing no such time limit, any owner or person interested in the lands may apply to the Board for an order that the company shall acquire such lands, or take the necessary steps for such purpose, within such time as the Board deems proper, and thereupon the Board may make such order in the premises as appears just.

Application
for time
limit.

(3) Where no time is fixed by the Board as above mentioned, if the company, within one year after any such sanction or leave has been given by the Board, or in any case where no such sanction or leave is necessary, if the company within one year after the plan, profile and book of reference have been deposited with the registrar of

Company
must acquire
within one
year.

Liability for
damages.

deeds, does not either acquire the lands covered by such sanction, leave, or plan, profile and book of reference, or give the notice mentioned in section two hundred and fifteen in respect thereof, the company's right to take or enter upon, without the consent of the owner, any part of such lands which it has not within the said year either acquired or given such notice in respect of, shall at the expiration of such year absolutely cease and determine, unless the Board, after notice to the owner and upon such terms as the Board may deem proper, otherwise orders. If no such order is made by the Board the company shall be liable for damages and costs to any person damaged by such failure to acquire the lands or give such notice. 1911, c. 22, s. 4. Am.

Sub-sections (1) and (2) first appeared as 1-2 Geo. V., cap. 22, sec. (4), being an amendment to sec. 159 of R.S.C. (1906), cap. 37. Sub-section (3) is new.

The sanction of the plan, profile and book of reference by the Board, and the deposit of them in the proper Registry Offices gives a company the right, on complying with the requirements of the Act, to construct its railway across or upon the lands of any person on the located line. Before 1-2 Geo. V., cap. 22, sec. 4, came into force (19th May, 1911), it was held that in spite of the deposit of sanctioned plans, etc., the company was not bound to acquire any lands on the located line which were not actually taken or required for physical occupation by the railway. Furthermore, the company could not be compelled by mandamus to acquire title to such lands: **Vancouver, etc., Railway and Navigation Co. v. McDonald**, 12 C.R.C. 74, 44 S.C.R. 65. The enactment of 1-2 Geo. V. now appears as sec. 171 (1) and (2), and a new sub-section (3) has been added. The effect of sec. 171 is that the Board in sanctioning the location or in giving leave to expropriate lands may set a time within which the company must acquire the lands shewn on the plan, or serve notice of expropriation, or within which notice of expropriation shall be conclusively deemed to have been given. The remedy of the land-owner for failure by the company to comply with an order so limiting the time is not specifically mentioned in this section, but it is suggested that his proper remedy is to apply under sec. 219 for an arbitration or under sec. 33 (2) for a mandatory order. If no time limit is set by the Board, any owner

or person interested in the lands may apply to the Board for an order compelling the company to acquire the lands or take steps to do so. If no such application and order is made, then one year after the date of sanction, if the company has not acquired the lands or given notice of expropriation, the company's right to enter or expropriate without the consent of the owner ceases, unless special leave is given by the Board. If no time limit is set in the order of sanction, and the time is not extended, the company is liable to an action for damages and costs by any person damaged by the failure to acquire the lands or serve notice of expropriation. This remedy, however, does not seem to be applicable where a time limit has been set. Remedies having been provided by the Act for any neglect or omission under this section, a mandamus would not properly be granted against the company. **Reg. v. The Commissioners of Inland Revenue, In re Nathan** (1884), 12 Q.B.D. 461, **re Whitaker and Mason** (1889), 18 O.R. 63, **re Marter and Gravenhurst** (1889), 18 O.R. 243, **City of Kingston v. Kingston, etc., Electric Ry.** (1897), 25 A.R. 462, and see 49 D.L.R. 478. Under a similar enactment in Manitoba, 3 Geo. V., cap. 55, it was held that a railway company having filed a plan, and not having acquired the lands covered by it within a reasonable time, the Public Utilities Commissioner might order the removal of the plan, or make such other order as to him might seem proper, and that the owner of a single parcel of land shown on the plan was entitled to apply for such an order. **In re Winnipeg, etc., Ry. Co.**, 15 C.R.C. 66, 10 D.L.R. 469, affirmed 15 C.R.C. 183, 11 D.L.R. 147.

The damages for which the Company is made liable are not those "incurred in consequence of such notice and abandonment" (as in sec. 218 (1)), but damages for "failure" to acquire the lands or give the notice. What this means, or what may be the measure of damages under this provision, must be left to the Courts to determine.

Under the former Act it was held that the Board had no power to compel completion of a railway of which the route map had been approved. **Mervin v. C.N.R.**, 14 C.R.C. 363.

Deposit of Plans, etc., after Sanction.

172. (1) The plan, profile and book of reference, when so sanctioned, shall be deposited with the Board, and each plan shall be numbered consecutively in order of deposit.

Deposit with Board.

With regis-
trar of deeds.

(2) The company shall also deposit copies thereof, or of such parts thereof as relate to each district or county through which the railway is to pass, duly certified as copies by the Secretary, in the offices of the registrars of deeds for such districts or counties respectively. R.S., c. 37, s. 160.

Former section 160.

This section does not apply to plans prepared under section 180: **Saskatchewan Land and Homestead Co. v. Calgary, etc., Ry. Co.**, 16 C.R.C. 114, 14 D.L.R. 193, 6 Alta. L.R. 471, affirmed 19 C.R.C. 126, 21 D.L.R. 172, 51 S.C.R. 1. The date at which the compensation or damages for land taken is ascertained is fixed by the deposit of the plan, profile and book of reference. Sec. 221 (2) **James v. Ont. and Que. Ry. Co.** (1887), 15 A.R. 1; **In re Myerscough and L.E. & N. Ry. Co.**, 15 C.R.C. 168, 11 D. L.R. 458.

Errors.

Errors.

173. The railway may be made, carried or placed across or upon the lands of any person on the located line, although through error or any other cause, the name of such person has not been entered in the book of reference, or although some other person is erroneously mentioned as the owner of or entitled to convey, or as interested in such lands. R.S., c. 37, s. 161.

Former section 161.

The words in section 118 (Act of 1888) "or within the distance from said line as aforesaid" were struck out by 63-64 Vic., cap. 23, sec. 5.

Corrections.

174. (1) Where any omission, mis-statement or error is made in any plan, profile or book of reference so registered, the company may apply to the Board for a certificate to correct the same.

Procedure.

Notice.

(2) The Board may, in its discretion, require notice to be given to parties interested, and, if it appears to the Board that such omission, mis-statement or error arose from mistake, may grant a certificate setting forth the nature of the omission, mis-statement or error and the correction allowed.

(3) Upon the deposit of such certificate with the Board, and of copies thereof, certified as such by the Secretary, with the registrars of deeds of the districts or counties, respectively, in which such lands are situate, the plan, profile or book of reference shall be taken to be corrected in accordance therewith, and the company may, thereupon, subject to this Act, construct the railway in accordance with such correction. R.S., c. 37, s. 162. Am.

Former section 162, with sub-sec. (4), permitting two justices to exercise the powers of the Board under that section omitted.

Deposit of Plans, etc., of Completed Railway.

175. (1) A plan and profile of the completed railway or of any part thereof which is completed and in operation, and of the land taken or obtained for the use thereof, shall, within six months after completion of the undertaking, or within six months after beginning to operate any such completed part, as the case may be, or within such extended or renewed period as the Board at any time directs, be made and filed with the Board.

(2) Plans of the parts of such railways so completed or in operation located in different districts and counties, prepared on such a scale, and in such manner and form, and signed or authenticated in such manner, as the Board may from time to time, by general regulation or in any individual case, sanction or require, shall be filed in the registry offices for the districts and counties in which such parts are respectively situate. R.S., c. 37, s. 164.

Former section 164.

The provision for a penalty for the breach of this section will be found in section 396.

Duties of Registrars of Deeds.

176. (1) Every registrar of deeds shall receive and preserve in his office, all plans, profiles, books of reference, certified copies thereof, and other documents, required by this Act to be deposited with him, and shall en-

dorse thereon the day, hour and minute when the same were so deposited.

Extracts and
copies.

(2) All persons may resort to such plans, profiles, books of reference, copies and documents so deposited, and may make extracts therefrom, and copies thereof, as occasion requires, paying the registrar therefor at the rate of ten cents for each hundred words, so copied or extracted, and ten cents for each copy made of any plan or profile.

Fees.

Registrar to
furnish certi-
fied copies.

(3) The registrar shall, at the request of any person, certify copies of any plan, profile, book of reference, certified copy thereof, or other document, deposited in his office under the provisions of this Act, or of such portions thereof as may be required, on being paid therefor at the rate of ten cents for each hundred words copied, and such additional sum, for any copy of plan or profile furnished by him, as is reasonable and customary in like cases, together with fifty cents for each certificate given by him.

Certificate of
registrar.

(4) Such certificate of the registrar shall set forth that the plan, profile or document, a copy of which, or of any portion of which, is certified by him, is deposited in his office, and shall state the time when it was so deposited, and that he has carefully compared the copy certified with the document on file, and that the same is a true copy of such original.

Evidence.

(5) Such certified copy shall be **prima facie** evidence of the original so deposited, that such original was so deposited at the time stated and certified, and that the same was signed, certified, attested or otherwise executed by the persons by whom and in the manner in which the said original purports to be signed, certified, attested or executed, as shown or appearing by such certified copy; and, in the case of a plan, that such plan is prepared according to a scale and in a manner and form sanctioned by the Board. R.S., c. 37, ss. 163, 74.

Sub-sec. (1) to (4) correspond to former section 163, the words "certified copy thereof" and "other" in lines 2 and 3 of sub-sec. (3) being new. Sub-sec. (5) corresponds to former section 74. See also sec. 397 for provision as to penalty. Deposit under the provisions of this

Act is equivalent to registration under a Provincial Registry Act: *City of Regina v. C.P.R.*, 16 C.R.C. 238. See also *City of Edmonton v. Calgary & Edmonton Ry. Co.*, 22 C.R.C. 182, 30 D.L.R. 222, 53 S.C.R. 406.

Board may require further Plans, etc.

177. In addition to the plans, profiles and books of reference elsewhere provided for, the company shall, with all reasonable expedition, prepare and deposit with the Board, any other or further plans, profiles, or books of reference of any portion of the railway, or of any siding, station or works thereof, which the Board may from time to time order or require. R.S., c. 37, s. 166.

Further plans, etc., as Board requires.

Former section 166, the words "the plans, profiles and books of reference elsewhere provided for," substituted for "such plans, profiles and books of reference."

This section first appeared in the Act of 1903 as section 129. Until the requirements of the Board are satisfied, the construction of the railway cannot proceed. See sec. 166.

Deviations, Changes and Removal.

178. (1) If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed, showing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board.

Deviations, changes or alterations.

Plan, profile, etc.

Sanction.

(2) The plan, profile and book of reference of the portion of such railway so proposed to be changed shall, when so sanctioned, be deposited and dealt with as hereinbefore provided with respect to such original plan, profile and book of reference.

Deposit.

(3) The company may thereupon make such deviation, change, or alteration, and all the provisions of this Act shall apply to the portion of such line of railway, at

Company may execute works.

any time so changed or proposed to be changed, in the same manner as they apply to the original line.

Board may
dispense
with pro-
ceedings.

(4) The Board may, either by general regulation, or in any particular case, exempt the company from submitting the plan, profile and book of reference, as in this section provided, where such deviation, change, or alteration is made, or to be made, for the purpose of lessening a curve, reducing a gradient, or otherwise benefitting the railway, or for any other purpose of public advantage, as may seem to the Board expedient, if such deviation, change, or alteration does not exceed three hundred feet from the centre line of the railway, located, or constructed, in accordance with the plans, profiles and books of reference deposited with the Board under this Act.

Termini to
be observed.

(5) Nothing in this section shall be taken to authorise any extension of the railway beyond the termini mentioned in the Special Act. R.S., c. 7, s. 167.

Former section 167.

The effect of this section is to deprive the company of any right to deviate in constructing its line from the located line except under the provisions of this section with the approval of the Board.

Brooke v. Toronto Belt Line Ry. Co., 21 O.R. 401.

The compulsory power of expropriation ceases upon the completion of the railway.

Kingston & Pembroke Ry. Co. v. Murphy, 17 S.C.R. 582.

No notice to persons interested is required under this section, and orders may be made *ex parte*. **Walker et al. v. Toronto and Niagara Power Co.**, 5 C.R.C. 190. In this case the applicants had not moved to rescind the order within the ten days after the order came to their notice. The Board therefore dismissed the application without considering the jurisdiction of the Board to make orders respecting such a company. Held, however, that a company having such extensive powers as the respondents had, and not being authorised to construct between two defined termini only, would not exhaust its powers of expropriation by the construction of one line which they afterwards wished to alter or divert. Where a company wishes to carry any street railway or tramway, or

any railway operated or to be operated as a street railway or tramway along any highway which is within the limits of any city or incorporated town, the Board must authorise the placing of the railway upon the street in accordance with the terms of the consent of the municipality, or refuse the application. For the purpose of giving effect to such consent, the Board may authorise a deviation from the location plans as approved without a new application or the filing of further plans and profiles. **Robertson v. Chatham, Wallaceburg & Lake Erie Ry. Co.**, 7 C.R.C. 96.

The effect of this section is confined to a deviation, change or alteration **required by the company**. And so where under the terms of an agreement between a municipality and a railway company, confirmed by by-law of the municipality and Act of Parliament, the railway company had definitely established its location and constructed its line, it was held that the Board had no right to order a deviation on the application of the municipality: **Hamilton v. T.H. & B. Ry. Co.**, 17 C.R.C. 353, reversed on stated case to the Supreme Court, 17 C.R.C. 370, 20 D.L.R. 935, 50 S.C.R. 128. Such an agreement validated as above, is a Special Act within the meaning of sections 2 (28) and 3, *ibid* at pp. 374 and 381. Where a railway has been operated under a franchise granted by an agreement with a municipality, the agreement defining the location, it has been held that the railway company could not obtain an order for a deviation: **Toronto, etc., Ry. Co. v. Toronto**, 17 C.R.C. 346, 15 D.L.R. 270.

Quaere, whether such an agreement would be held to estop either party thereto, in the absence of the consent of the other, or whether the case would be distinguished on the ground that a railway had no powers outside of the terms of its franchise.

Quaere whether under sections 33 (2), 36, 37 and 178 the Board might in the public interest and safety order such a deviation, change or alteration, in spite of such an agreement, if the subject matter of the agreement does not cover the public interest or safety at the time of the application: **G.T.R. v. Department of Agriculture for Ontario** (Vineland Station Case), 10 C.R.C. 84, 42 S.C.R. 557; **C.P.R. v. Toronto** (Viaduct Case), 1911 A.C. 461, 12 C.R.C. 378. The point was raised at the preliminary hearing of the **Hamilton and T.H. & B. Ry. Co. Case**, but was unnecessary to be considered in view of the opinion of the Supreme Court on the stated case.

Unauthorized
changes for-
bidden.

179. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, or remove, close, or abandon any station, or divisional point or create a new divisional point which would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby. 1913, c. 44, s. 2.

Compensa-
tion.

Former section 168 (2) amended by 3-4 Geo. V., cap. 44, sec. 2, and considerably altered in this revision. The original enactment in the Act of 1906 was as follows: "The company shall not make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with." The amendment of 3-4 Geo. V. forbade the removal, closing or abandoning of any station or divisional point without leave of the Board, and provided for the compensation of employees for loss caused by change of residence rendered necessary thereby. The present section, while forbidding the creation of a new divisional point which would involve the removal of employees, without the leave of the Board, by its new wording appears to restrict the effect of the original enactment.

The Act of 1906 forbade any change, alteration or deviation without filing a plan, profile and book of reference, obtaining the consent of the Board, and depositing the plan, etc., when sanctioned, in the proper Registry Office. The Act of 1913 forbade the removal, closing or abandonment of any station or divisional point without leave of the Board. If, however, the words "which would involve the removal of employees" apply to all the words "or remove, close, or abandon any station, or divisional point" as well as to the words "or create a new divisional point," then no leave is necessary before removing, closing or abandoning any station or divisional point or creating a new divisional point, if the moving of employees is not involved. There is no reported decision on the point.

Branch Lines.

Power to
construct.

180. The company may, for the purposes of its undertaking, construct, maintain and operate branch lines,

not exceeding in any one case six miles in length, from the main line of the railway or, except as hereinafter provided, from any branch thereof. R.S., c. 37, s. 221. Am.

Former section 221, amended by the insertion of the words "except as hereinafter provided," after the word "or" in the fourth line.

An industrial spur across private property is not part of the railway within the meaning of sections 180, 181 and 185, and therefore, on an application by the company under the branch lines sections before the passing of sec. 186, to extend the spur, the Board had no jurisdiction to make the order without the consent of the owner of the land on which the spur was constructed: **C.N.R. v. Blackwood, etc., Co. and Winnipeg**, 12 C.R.C. 40, 12 C.R.C. 45, 44 S.C.R. 92, **Beverly, etc., Co. v. G.T.P. Ry. Co.**, 23 C.R.C. 64, 44 D.L.R. 364; and see **Kammerer v. C.P.R.**, 21 C.R.C. 74.

The section does not enable a company authorised to build a bridge and lay tracks thereon, but not to build a railway, to build a branch line: **International Bridge and Terminal Co. v. C.N.R. & Russel Bros.**, 21 C.R.C. 218.

For general conditions upon which orders permitting the crossing of highways by branch lines and industrial spurs will be made; see **Shragge v. Winnipeg**, 24 C.R.C. 61 and **G.T.R. v. Cobourg**, *ibid.*, 58. See notes to section 185.

181. Before commencing to construct any such branch line, the company shall,— Procedure.

- (a) make a plan, profile and book of reference, Plans, etc.
showing the proposed location of the branch line, with the particulars hereinbefore required as to plans, profiles and books of reference of the main line, and deposit the same, or such parts thereof as relate to each district or county through which the branch line is to pass, in the offices of the registrars of deeds for such districts or counties respectively;
- (b) upon such deposit, give four weeks' public notice of its intention to apply to the Board under this section in some newspaper published in each county or district through which the branch line Notice of application to Board.

is to pass, or, if there should be no newspaper published in such county or district, then for the same period in the **Canada Gazette**; Provided that the Board may dispense with or shorten the time of such notice in any case where it deems proper; and,

Papers to be submitted.

- (c) after the expiration of the notice submit to the Board, upon such application, a duplicate of the plan, profile and book of reference so deposited. R.S., c. 37, s. 222.

Former section 222.

Board may authorize branch line.

182. (1) The Board, if satisfied that the branch line is necessary in the public interest or for the purpose of giving increased facilities to business, and if satisfied with the location of such branch line, and the grades and curves as shown on such plan, profile and book of reference may, in writing, authorize the construction of the branch line in accordance with such plan, profile and book of reference, or subject to such changes in location, grades and curves as the Board may direct.

Time for construction.

(2) Such authority shall limit the time, not exceeding two years, within which the company shall construct and complete such branch line. R.S., c. 37, s. 223.

Former section 223.

It has been decided that the Board has no power under former section 50, now section 41, to enlarge the time for such construction or completion beyond the prescribed period of two years.

The Board is a public body and is not confined to the evidence submitted upon the application in deciding whether the branch line is necessary in the public interest. **Re Application of Vancouver, Westminster and Yukon Railway Company to construct branches or spurs in Vancouver.** April 10th, 1907, 4th Annual Report, p. 222.

The provisions of sub-sec. (2) are not inconsistent with those of sec. 171. The limitation of time in this section refers to the time for construction and completion of the line. The limitation in sec. 171 refers to the time within which steps must be taken to acquire the land.

183. (1) There shall be deposited with the Board the authority and the duplicate of such plan, profile and book of reference, together with such papers and plans as are necessary to show and explain and changes directed by the Board, under the provisions of the last preceding section.

Papers to be deposited with Board.

(2) The company shall deposit in the registry offices of the counties or districts through which the branch line is to pass, copies, certified as such by the Secretary, of the authority, and of the papers and plans, showing the changes directed by the Board.

Copies with registrars of deeds.

(3) No branch line shall be,—

No extension allowed.

(a) extended under the foregoing provisions for the construction of branch lines; or,

(b) constructed so as to form, in effect, an extension of the railway beyond the termini mentioned in the Special Act.

(4) Except with reference to branch lines authorized by the Special Act to be constructed between any two points or places definitely fixed or named therein, no power to construct branch lines in any Special Act contained, inconsistent with the foregoing provisions for the construction of branch lines, shall have any force or effect after the first day of February, one thousand nine hundred and seven: Provided that nothing in this sub-section shall be deemed to take away or impair the rights or powers of any company under any contract with the Government of Canada, approved and ratified by a Special Act of the Parliament of Canada. R.S., c. 37, s. 224.

Special Act controlled.

Saving.

Former section 224.

184. Upon compliance with the requirements of the last four preceding sections all the other provisions of this Act, except sections one hundred and seventy and one hundred and seventy-two, relating to the sanction by the Board of the plan, profile and book of reference of the railway, and the deposit thereof with the Board and in the offices of the registrars of deeds for the districts or counties through which the railway is to pass, shall, in so

Provisions applicable.

far as applicable, apply to the branch lines so authorized, and to the lands to be taken for such branch lines. R.S., c. 37, s. 225.

Former section 225.

The corresponding section 121 in the Act of 1888 incorporated in one long paragraph all the special provisions deemed to be necessary for the construction of branch lines contained in section 175 in the Act of 1903 and which are now contained in sections 180 to 187. The particular purposes for which they might be constructed were designated in detail and the general words "for the purposes of its undertaking" have been substituted for the specific instances given in the previous enactment. The whole section should be read in conjunction with sec. 162 (h), *ante*; sec. 162 (p), *ante*, would no doubt be also applicable to this as to all other powers conferred by that section. The corresponding English provision is to be found in 8 Vict., cap. 20, sec. 76 (Imp.). Provisions similar to those contained in this section appeared in earlier railway consolidations: See R.S.C., cap. 109, sec. 45; and 42 Vict., cap. 9, secs. 7 (18) and 100, but by these earlier Acts these provisions were, of course, subject to the powers conferred upon railways and by sec. 6 (7) of R.S.C. 109, and sec. 7 (2) of 42 Vict., the privilege was limited to cases in which power to make branch railways was conferred by the special act. Any railway subject to the jurisdiction of the Federal Parliament may now make branch railways where necessary for the purposes of its undertaking. Such cases as **Murphy v. Kingston, etc., Ry. Co.**, 11 O.R. 302, at p. 306, and 17 S.C.R. 582, and **Re Bronson & Ottawa**, 1 O.R. 415, must therefore be read in the light of the changes which were made in 1888 and 1903, *supra*. Apart from the express provisions of section 183, it would still appear from **Murphy v. Kingston, etc., Ry. Co.**, that a railway company could not under pretence of constructing a branch railway extend its main line for six miles beyond the terminus fixed by its act of incorporation; unless it is empowered to do so by its Special Act: **C.P.R. v. Major**, 13 C.R. 233. See also **Vancouver v. C.P.R.**, 2 B.C.R. 306, 23 S.C.R. 1. The special powers conferred upon the Canadian Pacific Railway Company to make branch lines under the contract with the Government ratified by 44 Vict., cap. 1 (D), appear to be expressly saved by section 183 (4). Where a railway company has complied with all the provisions of the statute respecting branch lines it may proceed with the expropriation of the land required in the same manner as

it is authorised to do in the construction of its main line: **Todd v. Meaford**, 3 C.R.C. 375, 6 O.L.R. 469. For an instance of breach of contract with a town to construct a branch line see **Re Barrie and Northern Ry. Co.**, 22 U.C.R. 25.

Spur lines constructed under the provisions of sec. 181 do not **ipso facto** become part of the railway from which they are built, where the ties, rails and fastenings become the property of the railway, and the owner of the land supplies the right of way, and before the passing of section 186 no such siding could be extended to the land of another owner. In the public interest, however, the Board may order the expropriation of the land on which the spur has been constructed and the subsequent extension: **Boland v. G.T.R.**, 18 C.R.C. 60, 21 D.L.R. 531; **Beverly, etc., Co. v. G.T.P. Ry. Co.**, 23 C.R.C. 64, 44 D.L.R. 364 and see now sec. 186.

Section 184 applies to spurs or branch lines ordered under sec. 185 as well as to branch lines authorised under sec. 181. The lands necessary for a spur constructed under sec. 185 are therefore to be acquired by agreement or expropriation in the same manner as lands for other railway purposes. Consequently, where lands so required have been provided for the applicant for the spur, without compensation, they do not become vested in the railway company by operation of sec. 185, sub-sec. (5) upon refund of the cost of the spur: **Standard, etc., Co. v. G.T.R.**, 18 C.R.C. 374.

The granting of authority by the Board under this section does not of itself authorise the grading of the line across a highway or another railway without specific leave therefor from the Board.

But an industrial siding crossing a highway should not be removed upon notice from the municipality, but only by direction of the Board: **G.T.R. v. Cobourg**, 24 C.R.C. 58; **Shragge v. Winnipeg**, *ibid.*, 61, and see section 187.

Industrial Spurs.

185. (1) When any industry or business is established or intended to be established, within six miles of the railway, and the owner of such industry or business, or the person intending to establish the same, is desirous of obtaining railway facilities in connection therewith,

Branch lines
required by
owner of any
industry.

but cannot agree with the company as to the construction and operation of a spur or branch line from the railway thereto, the Board may, on the application of such owner or person, and upon being satisfied of the necessity for such spur or branch line in the interests of trade, order the company to construct, maintain and operate such spur or branch line, and may direct such owner or person to deposit in some chartered bank such sum or sums as are by the Board deemed sufficient, or are by the Board found to be necessary to defray all expenses of constructing and completing the spur or branch line in good working order, including the cost of the right of way, incidental expenses and damages.

Owner to
deposit cost.

Payment
therefrom to
the company.

(2) The amount so deposited shall, from time to time, be paid to the company upon the order of the Board, as the work progresses.

Repayment
to owner by
rebate on
tolls.

(3) The aggregate amount so paid by the applicant in the construction and completion of the said spur or branch line shall be repaid or refunded to the applicant by the company by way of rebate, to be determined and fixed by the Board, out of or in proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

Lien to
owner mean-
time.

(4) Until so repaid or refunded, the applicant shall have a special lien for such amount upon such branch line, to be reimbursed by rebate as aforesaid.

Discharge of
lien.

(5) Upon repayment by the company to such applicant of all payments made by the applicant upon such construction, the said spur or branch line, right of way and equipment shall become the absolute property of the company free from any such lien.

Operation of
branch to be
regulated by
Board.

(6) The operation and maintenance of the said spur or branch line by the company, shall be subject to and in accordance with such order as the Board makes with respect thereto, having due regard to the requirements of the traffic thereon, and to the safety of the public and of the employees of the company.

Provisions
applicable.

(7) All the provisions of this Act respecting the construction of spur or branch lines shall apply to any spur

or branch line constructed under this section. R.S., c. 37, s. 226.

Former section 226.

The rebate provided for in sub-section 3 is not restricted to tolls for the carriage of goods over the spur or branch line, but is applicable to tolls for the carriage of traffic over the main line to and from the industry: **G.T.R. v. Hepworth Silica Pressed Brick Co.**, 18 C.R.C. 9, 51 S.C.R. 81, 19 C.R.C. 365.

This section first appeared in the Act of 1903 and embodies in statutory form a practice frequently adopted by railway companies, where there is a prospect of obtaining business from some industry adjoining their line, of building sidings or branch lines to the factory or industry (known as **industrial sidings**), and for this purpose exercising their statutory powers of expropriation, etc., upon receiving from the owners of such industry an amount sufficient to defray the cost of building the siding or branch; the expense to be repaid to the owner by allowing a rebate upon the freight charges due in respect of every car of freight shipped in or out upon the siding, such rebate being in sums of one or two dollars. An inducement to railway companies to enter into such voluntary arrangements has frequently been an undertaking to route all freight as far as legally possible over its line in preference to the lines of other companies who are not parties to granting the facilities. As is shown by the recitals in 3 & 4 Vict., cap. 97, sec. 18 (Imp.), the practice was to require railway companies in their Special Acts to permit individuals to connect branch lines built at their own expense with the railway's main line and in case of dispute the matter was to be decided by the Board of Trade: **ibid.** secs. 3 and 19, and 5 & 6 Vict., cap. 55, sec. 12. The matter is now provided for in England by 8 Vict., cap. 20, sec. 70 (Imp.), which permits the owners of property to lay lines of railway down upon their own lands or lands of others whose consent they can obtain and compels railway companies to make openings in their main line and permit a junction with a branch line so constructed subject to certain restrictions therein set out. It has been decided under the English Act that these provisions are not confined to the time at which the railway is constructing its line, but apply from time to time thereafter as occasion may require: **Monkland, etc., Ry. Co. v. Dixon**, 3 R.C. 273; **Bishop v. North**, **ibid.** 459, 11 M. & W. 418; that where a company have consented to an

opening even by parol they cannot afterwards revoke their consent: **Bell v. Midland Ry. Co.**, 3 DeG. & J. 673; that where a company took up a connection already made without consent they must replace it at their own expense. Cf. **C.N.R. v. Robinson**, 6 C.R.C. 101; 37 S.C.R. 541; **Portway v. Colne, etc., R.W. Co.**, 7 Ry. & C. Tr. Cas. 102, and that where old fashioned switches appropriate at the time have been installed and long used the railway company if it wishes to install improved appliances must do so at its own expense: **Woodruff v. Brecon, etc., Ry. Co.**, 28 Ch.D. 190. In **Lancashire Brick, etc., Co. v. Lancashire, etc., Ry. Co.** (1902), 1 K.B. 381, 651, it was decided under the English Act that the plaintiffs could not compel defendants to make the junction where, owing to a heavy grade and the state of business at the point suggested for making the junction, there were either structural difficulties in making an opening or difficulties would arise in working the traffic upon the railway. It will be observed that the Act empowers the Board to do what the court will not do, namely, supervise the construction and maintenance and operation of a railway: **Kingston v. Kingston Ry. Co.**, 28 O.R. 399, 25 A.R. 462, and see 1 C.R.C. 296; but it may perhaps be said that the Board has machinery for enforcing a decree to build a siding that the court has not; though what is to happen if a railway does not obey the order of the Board is not clear. Section 444, *infra*, provides *inter alia* that where a company refuses to obey an order of the Board it is to be liable in damages to any person aggrieved and to certain penalties therein prescribed.

Where an industrial siding is built at the expense of an applicant the entire cost, both of construction and maintenance, should be borne by the applicant: **Bienfait Commercial Co. v. C.P.R.**, 23 C.R.C. 62.

An agreement should not be made for the construction of a private siding on the company's right of way: **C.P.R. v. Vancouver, etc., Ry. Co.**, 23 C.R.C. 1. But where such an agreement has been made, the spur should not be removed or re-located, if the parties do not agree, without the leave of the Board. **In re Great Northern Ry. Co. Sidings**, 23 C.R.C. 5. The Board will not order sidings between stations which are close together, *e.g.*, six or seven miles: **Pheasant Point Farmers v. C.P.R.**, 14 C.R.C. 13, 7 D.L.R. 887.

On an application for the construction of a spur, the Board will not go into the matter of title. If it is a

proper case for a spur, the Board will make the order, and leave the question of title to the Provincial Courts: **Greenfield Conduit Co. v. Hetherington**, 16 C.R.C. 444, See sec. 317 (5) which Duff, J. (11 C.R.C. at p. 49) says is perhaps little more than a confirmation by the legislature of the decision of the Supreme Court in **C.N.R. v. Robinson**, 37 S.C.R. 541.

186. Notwithstanding anything done under the last preceding section and notwithstanding any agreement made thereunder or otherwise the Board may, on application, permit any owner of another industry or business or any person intending to establish another industry or business, within six miles of the railway, to have traffic carried over any spur or branch line, or any part thereof, constructed pursuant to the said section or to have such spur or branch line extended: Provided that any terms and conditions which the Board thinks just and reasonable shall always be imposed, and regard shall always be had to the convenience of the owner or person having senior rights in such spur or branch line. **New.**

Use of spur
for another
industry.

This section is new and is known as the "forced construction" section. It over-rules **C.N.R. v. Blackwood, etc., Co. and Winnipeg**, 12 C.R.C. 45, 44 S.C.R. 92; and **Beverly, etc., Co. v. G.T.P. Ry. Co.**, 23 C.R.C. 64, 44 D.L.R. 364, in so far as those cases decide that a siding or spur constructed under section 185, known as the "forced construction" section, on private property cannot be extended to the land of another owner. In such case, however, the owner of the land on which the original spur was constructed would be entitled to compensation for his land under sec. 184.

187. No branch line or spur constructed pursuant to either of the last two preceding sections shall be removed without the consent of the Board. **New.**

Removal.

This section is new. See **Shragge v. Winnipeg**, 24 C.R.C. 61; **G.T.R. v. Cobourg**, 24 C.R.C. 58.

Stations.

188. (1) Before the company proceeds to erect any station upon its railway, the location of such station shall be approved of by the Board.

Stations.
location of
to be approved
by Board

Facilities.

(2) Every station of the company shall be erected, operated and maintained with good and sufficient accommodation and facilities for traffic.

Board may order station.

(3) The company shall erect, maintain and operate stations at any points on the railway designated by the Board, and shall provide such accommodation and facilities in connection therewith as the Board directs.

On railways subsidized by Parliament.

(4) In the case of any railway, whether subject to the legislative authority of the Parliament of Canada or not, subsidized in money or in land, after the eighteenth day of July, one thousand nine hundred, under the authority of an Act of the Parliament of Canada, the payment and acceptance of such subsidy shall be taken to be subject to the covenant or condition, whether expressed or not in any agreement relating to such subsidy, that the company, for the time being owning or operating such railway, shall, when thereto directed by order of the Board, maintain and operate stations, with such accommodation or facilities in connection therewith as are defined by the Board, at such points on the railway as are designated in such order. R.S., c. 37, s. 258. Am.

Former section 258 (sub-sec.) (3), being new, and sub-sec. 4 corresponding to former sub-sec. (3).

The Board has jurisdiction to order platforms, freight sheds, etc., at stopping places, which are not regular stations or agencies (Flag Station Case): **Winnipeg Jobbers and Shippers Assn. v. C.P.R., C.N. and G.T.P. Ry. Co.**, 8 C.R.C. 151. See this case also for the general principles upon which the Board will act in ordering full equipment for a station.

The Board has fixed an arbitrary amount of \$15,000 as the revenue which a railway should derive at a station to warrant the Board in ordering the maintenance of an agent: **Ozias v. C.P.R.**, 18 C.R.C. 425; **Oakdale Grain Growers Assn. v. G.T.P. Ry. Co.**, 20 C.R.C. 70; **In re Lower Argyle Station**, 21 C.R.C. 434.

When a rail carrier subject to the jurisdiction of the Board owns, operates or uses a water carrier as a direct connection with the parent rail carrier, between any Canadian terminus of the rail carrier and any other port in

Canada, the earnings of the water portion should be considered as part of the through route and toll on an application for the maintenance of a station agent: **G.T.P. Ry. Co. v. New Hazelton**, 20 C.R.C. 169.

The Board has power to order a railway company whose line is completed and in operation to provide a station at any place where it is required to afford proper accommodation for the traffic on the road: **G.T.R. v. Department of Agriculture for Ontario**; 10 C.R.C. 84, 42 S. C.R. 557, but now see amendment to sec. 33 (2) omitting "authorised" in former section 26 (2), thereby limiting power of Board to order what it may require to be done. See p. 88, 10 C.R.C. per Fitzpatrick, C.J.

The Board will not require the establishment of a station within two or three miles of another one. **Eby et al. v. G.T.P. Ry. Co.**, 13 C.R.C. 22; **Forward v. C.P.R.**, 14 C. R.C. 377; nor where the station yard would be on a 4-10 grade and in close proximity to a long bridge. **Eby et. al. v. G.T.P. Ry. Co.**, *supra*.

The initial discretion as to location of stations is with the carrier. The Board will only intervene when there has been an unreasonable exercise of this discretion or when there are special circumstances: **Hartin v. C.N.R.**, 21 C.R.C. 437. But the location of a station is entirely a matter for the discretion of the Board, and its jurisdiction cannot be ousted by agreement, even though the agreement is validated by a Provincial Statute: **Vancouver v. Vancouver, etc., Co.**, 20 C.R.C. 72.

In deciding between conflicting applications for the location of a station, the Board should only intervene in the case of unjust discrimination between the company and the landowners. Proper facilities for the patrons of the railway are the basis upon which a location should be approved. The possible growth of a new town is not a proper consideration: **Druid Landowners v. G.T.P. Ry. Co.**, 14 C.R.C. 20, 7 D.L.R. 884; **G.T.P. Ry. Co. v. S. Hazelton**, 15 C.R.C. 101, 3 D.L.R. 1036.

Where a railway company has procured a conveyance of land for the express purpose of locating a station there, and on the faith of such a representation, and the Board has approved the location, the railway company is bound to carry out its bargain and establish a station on the approved location: **Kelly v. G.T.P. Ry. Co.**, 14 C.R.C. 15, 5 D.L.R. 303.

The Board, on proof of the public need for a station, will approve a location not desirable either from a railway engineering or operating standpoint, if the people to be served are willing to accept the facilities it is possible to give them: **G.T.P. Ry. Co. v. S. Hazelton**, 15 C.R.C. 101.

Notwithstanding the continued failure of a lessee railway to meet its obligations to a lessor railway, with respect to existing privileges in connection with the joint use of station premises, the lessor may, in the public interest, be required to extend further privileges to the lessee in such premises: **C.N.R. v. G.T.R.**, 20 C.R.C. 67.

Proper shelters and equipment for both passengers and freight should be provided at flag stations: **Rutter Station Patrons v. C.P.R.**, 14 C.R.C. 1, 8 D.L.R. 711.

Damages may be recovered in the civil courts for an illness contracted through the failure of a railway company to supply proper station accommodation: **Morrison v. Pere Marquette Ry. Co.**, 15 C.R.C. 406, 12 D.L.R. 344, 28 O.L.R. 317.

A foreign railway, in so far as it operates in Canada, is subject to the jurisdiction of the Board, and may be ordered to provide station facilities: **Thrift v. New Westminster, etc. and Great Northern Ry. Cos.**, 9 C.R.C. 205.

A Provincial railway not declared to be for the general advantage of Canada, but connected with and operated by a railway which is subject to the jurisdiction of the Board, is also subject to such jurisdiction, and so within this section, *ibid.* This case was decided upon the authority of former section 8 (b) placing through traffic upon such a provincial railway under the provisions of the Railway Act which was afterwards held to be *ultra vires*: **City of Montreal v. Montreal Street Railway Co.**, 43 S.C.R. 197, (1912), A.C. 333. The sub-section has been omitted from the present Act, see section 8 and the **Thrift Case** seems to be no longer an authority.

Public Control over Stations. Subject to the provisions of this section and section 312, *infra*, a station is the private property of the company and they may admit or exclude anyone they see fit: **Barker v. Midland Ry. Co.**, 18 C.B. 45, although a passenger or intending passenger about to obtain a ticket is entitled of course, access to it and to the use of it. Railways are not bound to allow hotel runners upon their premises and may exclude them if they see fit: **Perth v. Ross** (1897), A.C. 479, and a cabman

after he has completed his work may be required to leave and if he refuses he may be treated as a trespasser and removed by force if necessary: **Wood v. North British Ry. Co.**, 2 F. (Ct. Sess., 5 Ser.) 1. See also cases cited under Section 312, *sub nom.* Facilities. Though a person may be arrested as a trespasser at a station platform at common law, he could not be prosecuted under the English Regulation of Railway Act of 1868, section 23, for trespassing upon the railway, because the platform cannot for that purpose be treated as part of the railway. **Thompson v. Great North of Scotland Ry. Co.**, 2 F. (Just. Cas.) 22. A company may give a cab-owner the exclusive right of plying for hire at their stations where the arrangement is for the benefit of the public: **Reid v. Beadell**, 2 C.B.N.S. 509; **Painter v. London, etc., Ry. Co.**, *ibid.*, 702; **Ilfracombe v. London, etc., Ry. Co.**, 1 N. & Mac. 61, and the owner of an omnibus company cannot claim admission to a station or station grounds as of right: **Barker v. Midland Ry. Co.**, 18 C.B. 45; but a railway company will not be allowed to admit the omnibus of one proprietor to the exclusion of an omnibus belonging to another proprietor where such a monopoly would be inconvenient to the public: **Marriott v. London, etc., Ry. Co.**, 1 C.B.N.S. 499.

In London under the London Hackney Act it has been held that a station is not such a public "street or place" that a cab-man waiting for travellers is obliged to carry anyone else who offers himself for transport: **Case v. Storey**, L.R. 4 Ex. 319; but a cab-man standing on the station grounds is liable to the ordinary municipal provisions requiring him to obtain a license and pay a fee: **Clarke v. Stanford**, L.R. 6 Q.B. 357; **Allen v. Tunbridge**, L.R. 6 C.P. 481; see **Skinner v. Usher**, L.R. 7 Q.B. 423; but a cab-man must drive a traveller into the station grounds, not merely depositing him on the street, if his passenger so requires it, and the railway company permits: **Ex parte Kippins** (1897), 1 Q.B. 1. As although passenger stations are intended only for intended passengers or travellers and persons getting off trains, the company usually permits the friends of the passengers to accompany them to the station; they are entitled to greater rights than a bare license, and being there on the company's implied invitation, the company owes them the same duty as to passengers, viz.: safe means of ingress to and egress from its stations: **Oldright v. G.T.R.** (1895), 22 A.R. 286; **Watkins v. Great Western R.W. Co.**, 37 L.T.N.S. 193; **Flynn v. Toronto Ex. Assn.**, 9 O.L.R. 582; but a person posting a letter upon a train is a bare licensee and the company is

not liable for an accident happening to him due to the condition of the premises unless there is some concealed defect amounting to a trap: **Spence v. G.T.R.**, 27 O.R. 303. Although a company must keep the approaches to its station in good condition, it cannot be compelled to rebuild a bridge in order to accommodate an increased traffic if the bridge already built has been dedicated to the public and become a portion of the adjoining highway, and has therefore passed out of the control of the company: **Arbroath v. Caledonian Ry. Co.**, 10 Ry. & C. Tr. Cas. 252; **Milner v. Great Northern Ry. Co.** (1907), 1 Ch. 208. In England a company is liable for an injury to a passenger falling upon a piece of ice extending across the platform: **Shepherd v. Midland Ry. Co.**, 25 L. T.N.S. 879. But where an accident happens from something which has for a long time been used with safety as where a person stumbles against a weighing machine in the usual place and there is no other evidence of negligence the company is not liable: **Cornman v. Eastern Counties Ry. Co.**, 4 H. & N. 781. Where a box containing signal levers projects about two inches above a platform and an injury results the company has been held to be liable: **Sturges v. Great Western Ry. Co.**, 56 J.P. 278. Where timber becoming loose injures a passenger in a passenger train there is no evidence of negligence, if the mode of fastening the timber has been in accordance with the usual custom: **Hanson v. Lancashire, etc., Ry. Co.**, 20 W.R. 297, and where a person in search of the urinal lighted by a lamp falls through an open door and down some steps he has no right of action: **Toomey v. London, etc., Ry. Co.**, 3 C.B.N.S. 146; nor is a company liable for injuries done by a dog which happens to get into the station: **Smith v. Eastern Ry. Co.**, L.R. 2 C.P. 4. As already mentioned a company must provide reasonable means of access to and from their stations: **John v. Bacon**, L.R. 5 C.P. 437, and if a bridge over which passengers usually pass is not reasonably safe the company is liable to any one injured: **Longmore v. Great Western Ry. Co.**, 19 C. B.N.S. 183; but the mere fact of an opinion being given by witnesses that a bridge is dangerous is not evidence of negligence: **Rigg v. Manchester, etc., Ry. Co.**, 12 Jur. N.S. 525. And a bridge is only required to be safe for persons using it in the ordinary way, and a company is not liable for an accident to a child that walks over it sideways and does not look where it is going: **Lay v. Midland R.W. Co.**, 35 L.T.N.S. 529; also a person who falls down properly constructed stairs leading from a station cannot sue on the ground that less slippery material might have

been used: **Crafter v. Metropolitan Ry. Co.**, L.R., 1 C.P. 300.

Where a passenger having only two minutes to catch a train in running fell over a switch handle in his path on the station platform and was hurt the company was held liable: **Martin v. Great Northern Ry. Co.**, 16 C.B. 179; but if he takes an indirect and unusual road to the station not intended for a foot way where there is a direct road, well lighted and safe, he cannot recover for injuries received: **Walker v. Great Western Ry. Co.**, 8 U.C.C.P. 161; and so where a person leaves a safe for a dangerous path and is killed his widow could not recover: **Jones v. Grand Trunk Ry. Co.**, 16 A.R. 37, 18 S.C.R. 696; but where a company leaves a dangerous spot uncovered at an exit from a station which is frequently used a person injured was held entitled to recover: **Oldright v. G.T.R.**, 22 A.R. 286; See **Hansen v. C.P.R.**, 7 Can. Ry. Cas 429, affirmed **C.P.R. v. Hansen**, 7 Can. Ry. Cas. 441, 40 S.C.R. 194.

Passengers Alighting from or Boarding Trains. Where a train was too long to enable all the cars to draw up at a platform and where a person getting out alighted at a point where the step of the car was three feet from the ground a verdict in favor of a female passenger who was injured was sustained: **Foy v London, etc., Ry. Co.**, 18 C.B.N.S. 225; and the same result was reached where a train overshot a platform and the passengers were not warned to keep their seats, nor was the train backed up to the platform: **Siner v. Great Western Ry. Co.**, L.R. 3 Ex. 150, 4 Ex. 117. These cases were of course decided in England where there is no means of communication from one car to another; see also **Cockle v. London, etc., Ry. Co.**, L.R. 5 C.P. 457, 7 C.P. 321; **Bridges v. North London Ry. Co.**, L.R. 5 C.P. 459, 6 Q.B. 377, and 7 H.L. 213. Where on passing through a station its name was called out and a train stopped beyond a platform, but immediately afterwards was backed opposite to it, it was held that there was no evidence of negligence in this conduct, and that the calling out of the name of the station was hardly an intimation to passengers that the station at which they were about to stop was the particular station: **Lewis v. London, etc., Ry. Co.**, L.R. 9 Q.B. 66; **Buck v. C.P.R.**, 7 O.W.R. 71, but where on approaching a station the plaintiff heard its name called out, the train stopped, and the carriage doors were opened and shut and a person near him was seen to alight, and there was no light, no warning and no intimation that the stoppage

was only temporary it was held that he was entitled to recover for injuries received owing to the train having over-shot the platform whereby the plaintiff fell and was hurt: **Weller v. London, etc., Ry. Co.**, L.R. 9 C.P. 126, and see **Rose v. Northern Ry. Co.**, L.R. 2 Ex. D. 248; **Robson v. Northern Ry. Co.**, L.R. 10 Q.B. 271, 2 Q.B.D. 85. Where the plaintiff was being carried on a train on which she had never been carried before, though she knew the station very well, and the train was too long for the platform on account of which she fell and was hurt; though she admitted that she did not look on stepping down, there being evidence of an implied invitation to alight, she was held entitled to recover and was not precluded on account of contributory negligence: **Glasscock v. London, etc., Ry. Co.**, 18 T.L.R. 295. In **Hall v. McFadden**, 19 N.B.R. 340, 21 N.B.R. 586, Cassels' Supreme Court Digest 723, a passenger was waiting on a station platform until the time for starting had arrived, and while he was boarding the train, the conductor who was on the opposite platform and could not see the passengers who were getting on from the station, gave the signal to start, and the motion of the train threw the plaintiff down and he was injured; the conductor had previously called "All aboard." The Supreme Court held that there was evidence of negligence on the part of the company, and that after calling "All aboard," it is the conductor's duty to wait a reasonable time for passengers to get on before signalling to start; see also, **MacDonald v. St. John**, 25 N.B.R. 318. Where a plaintiff in Manitoba was alighting in the dark at a small station having no platform and no lights and hurt her knee (which had been previously weak) in stepping down, the brakeman assisting her and having his lantern at the spot, it was held that the defendants were not guilty of negligence: **McGinney v. C.P.R. Co.**, 7 Man. L.R. 151; **Guay v. C.N.R.**, 15 Man. L.R. 275.

In **Quebec Central Ry. Co. v. Lortie**, 22 S.C.R. 336, the train was longer than the platform, and the car in which Lortie was travelling was not opposite the platform when brought to a standstill. Lortie, fearing that his car would not be brought up to the station and that the train was about to move on, jumped to the ground with his portmanteau and alighted on a round stone and was hurt. It was held that there was nothing in these circumstances amounting to negligence on the part of the company.

In **Holland v. C.P.R. Co.**, 33 N.B.R. 78, the plaintiff and others were at a flag station on a dark night. The engine driver did not see their signal and failed to stop

until he had passed the station. While preparing to back down to it, some unknown person from the train platform shouted "Come on" and the plaintiff in obeying the summons fell into a culvert and was injured and it was held that there was no evidence of negligence. Where the plaintiff was travelling on a ticket good to a certain station, but for her own convenience was carried to a place a short distance beyond, to where a platform had been erected by a private person for his own purpose but with the company's consent, it was held that she could not recover for the injuries suffered in walking along the platform owing to some alleged defect in it; **Burke v. British Columbia, etc., Ry. Co.**, 7 B.C.R. 85. In **Giles v. Great Western Ry. Co.**, 36 U.C.R. 360, a passenger who was slightly intoxicated was found dead a little beyond the station at which he was to alight and the evidence as to whether the train stopped at the station long enough to enable passengers to get off was contradictory, but there was nothing to show how the deceased met his death, held that there was no evidence of negligence for a jury. In **Dunn v. Dominion Atlantic Ry. Co.**, 60 S.C.R. 310, a different result was reached. In **Delahanty v. Michigan Central Ry. Co.**, 3 C.R.C. 311, reversed 4 C.R.C. 451, a drunken passenger was put off at a small station near the Niagara River without being given into the charge of anyone, and he afterwards strayed after the train on which his luggage remained, and jumped or fell from a bridge and was drowned, and it was held that the defendants were not liable. In **Haldan v. Great Western Ry. Co.**, 30 U.C.C.P. 89, an intending passenger, who was a little late, tried to board a moving train and struck against an obstacle on the platform and was hurt. It was held that he could not recover. Where, after calling out the name of the next station, a train was slowed up on approaching and passing it, but was not fully stopped, it was held that there was evidence of an invitation to alight, and of negligence in not stopping, and that the plaintiff, who had tried to alight and was injured, could recover: **Edgar v. Northern Ry. Co.**, 4 O.R. 201; 11 A.R. 452. Where an attempt to board a moving train, even at the conductor's invitation, entails a patent and obvious risk, it may be that the plaintiff would not be entitled to recover: **Curry v. C.P.R.**, 17 O.R. 65; the mere fact of a passenger getting off a moving train is not necessarily negligence; but see **Mayne v. G.T.R.**, 22 C.R.C. 218, 39 D.L.R. 691; **C.P.R. v. Hay**, 24 C.R.C. 359; 46 D.L.R. 87. In every case it is a question for the jury whether the passenger acted reasonably under the circumstances, and

where a train scheduled to stop at a station did not stop long enough to enable passengers to get off, and a passenger attempting to alight after the train had started again, was thereby injured, he was held entitled to recover: **Keith v. Ottawa, etc., R.W. Co.**, 2 C.R.C. 23 and 27. The general subject of alighting from and boarding moving trains at stations, has been dealt with at length in 2 C.R.C., pp. 37 to 46; see **Swan v. C.N.R.**, 1 Alta L.R. 427, 9 C.R.C. 251; see also **McDougall v. G.T.R.**, 8 D.L.R. 271, 14 C.R.C. 316, 27 O.L.R. 369.

Covenants Respecting Stations and Other Works. The questions arising in cases of this kind are as numerous as the cases themselves, for each case depends more or less on its own circumstances, and other decisions are useful more for illustration than for the principles they lay down. Railways, when taking over other lines, or negotiating for bonuses or franchises with municipalities, or certain benefits from the individual owners of land, frequently enter into undertakings and make promises to which their subsequent policy or a change in the surrounding circumstances renders it expedient for them forever to adhere. The questions then arise (1) whether the covenant was *ultra vires* of the railway or the other contracting party; (2) what constitutes a fulfilment of it; (3) whether the covenant is perpetual or temporary; (4) whether it was waived or annulled by subsequent legislation; (5) whether mandamus, injunction, specific performance or damages is the proper remedy.

The interests of the public require that a railway should be maintained in the highest state of efficiency without being hampered by conditions which a change in the circumstances of a locality may have rendered detrimental, and this has led to a somewhat strict interpretation of contracts by railway companies to do certain specified acts or to maintain their line forever in a certain condition or position, particularly where these contracts may interfere with the railway premises, and consequently with the efficient operation of the line itself. As a rough working principle, the following may be quoted from Pierce on Railroads, page 62: "The construction of written conditions should be reasonable and such as will facilitate the objects of the enterprise and should have regard to a substantial compliance with the agreement rather than to a severely literal execution of its terms:" see **People v. Holden**, 82 Ill. 93. Nevertheless, where an agreement by a railroad to do a certain work is explicit, an injunction will be granted restraining the railway

from operating until it performs a condition precedent to its operation, which it has agreed to, for the inconvenience to the public by stopping the railway altogether until the conditions are performed is no defence to an action on an acknowledged breach of the agreement: **Raphael v. Thames Valley Ry. Co.**, 2 Ch. App. 147; the same principle is laid down by a divided court in **Lloyd v. London, Chatham and Dover Ry. Co.**, DeG. & Son. 568. Sometimes in the United States agreements requiring a particular location for a station, especially if excluding any other site for one, have been held to be contrary to public policy and not binding on the parties on the ground that they conflict with public interests: **Fuller v. Dame**, 18 Pick. 472; **Williamson v. Chicago, etc., Ry. Co.**, 22 Albany L.J. 29; Pierce on Railroads, pp. 60 and 513; and in New York subscriptions to stock conditioned upon the adoption of a certain route have been held void as against public policy: Pierce, p. 60. Similar contracts do not appear to have been regarded in this light in England. In **Raphael v. Thames Valley Ry. Co.**, L.R. 2 Eq. 37, Lord Romilly, M. R., refused to grant an injunction restraining a railway from operating until a condition was performed, on the ground that the rights of the travelling public should be considered, but he gave a reference as to damages, thus showing that he considered the agreement perfectly valid, and on appeal his decision was reversed and an injunction was granted regardless of the public interests, the existence both of the condition, and of a breach of it, being clear: see L.R. 2 Ch. App. 147, and **Wilson v. Northton and Banbury Junction Ry. Co.**, 9 Ch. App. 279; **Re South-Eastern Ry. Co. v. Wiffin** (1907) 2 Ch. 366. It will probably be convenient to consider these cases under the headings already suggested, as follows:—

(1) **Whether the covenant is ultra vires.** This question is too broad to be elaborately discussed in a note. **Whitby v. G.T.R.**, 1 C.R.C. 265, is an example of provisional directors making a contract which apparently would have been binding on the company had it been one within its general corporate powers and within those of its co-contractors, the town of Whitby. Provisional directors having a general power to conduct the affairs of a railway may bind it by an informal contract for services performed: **Allen v. Ontario and Rainy River Ry. Co.**, 29 O. R. 510, and they may perform the usual duties necessary to the management of the undertaking, such as dismissing employees: **O'Dell v. Boston and Nova Scotia Coal Co.**, 29 N.S.R. 385. They cannot, of course, bind the

company by any contracts not expressly or impliedly authorised by its charter: **Baroness Wenlock v. River Dee Company**, 10 A.C. 354; **Earl of Shaftesbury v. North Staffordshire Ry. Co.**, L.R. 1 Eq. 593; **Ashbury Carriage Co. v. Riche**, L.R. 7 H.L. 653. Where, as in **Whitby v. G.T.R.**, 1 C.R.C. 265, 269, 276, the contract is with a municipal corporation, it also becomes a debatable question whether the latter had the necessary power to make the contract. As pointed out by Armour, C.J.O., in that case, at p. 273, the power to bonus railways did not exist in favour of municipalities in Ontario until 34 Vict., cap. 30 (O.), unless it was provided for in the railway's Act of Incorporation; and for this reason such a provision was usually inserted in railway charters.

The powers of municipalities in this respect are discussed in **Canada Atlantic Ry. Co. v. Ottawa**, 8 O.R. 201, 12 A.R. 234, 12 S.C.R. 365; **Bickford v. Chatham**, 14 A.R. 32, 16 S.C.R. 235; **Grand Junction Ry. Co. v. Peterborough**, 8 S.C.R. 76, 13 A.C. 136; **Quebec Warehouse Co. v. Levis**, 11 S.C.R. 666; **St. Cesaire v. McFarlane**, Mont. L. R. 2 Q.B. 160, 14 S.C.R. 738; **Pontiac v. Ross**, 17 S.C.R. 406; but as these cases do not deal with the powers and duties of railways so much as of municipalities, they are not now enlarged upon here. As already mentioned, it has sometimes been held in the United States that contracts for the location of the line or some or one of its stations in a particular place have been declared *ultra vires*: **Pierce**, p. 513; but no such decision, other than the **Whitby Case**, has been found in England or Canada. The question must always largely turn on whether express or implied statutory power has been given to railways to receive benefits and give covenants imposing corresponding liabilities, and sufficient authority will now generally be found either in the Acts of Incorporation or in the general statutes, if any, incorporated with them. The **Whitby Case** is, however, authority for the proposition that the directors of a railway company have not, without express statutory authority, power to bind it by a contract imposing for all time a peculiarly onerous condition. Where validated by statute, see **Corbett v. South-Eastern Ry. Co.** (1905), 2 Ch. 280, (1906), 2 Ch. 12.

(2) **What constitutes a fulfilment of such conditions.** This must, of course, turn largely upon the form of words used, and no rule can well be laid down, except that performance or non-performance must depend upon the language employed. Where the contract requires a certain thing to be done off the railway lands, such as the making

of a road, as in **Raphael v. Thames Valley Ry. Co.**, 2 Ch. App. 147; the building of a road and wharf and their subsequent maintenance: **Wilson v. Furness Ry. Co.**, L.R. 9 Eq. 28, or an arch: **Storer v. Great Western Ry. Co.**, 2 Y. & C. Ch. 49; specific performance of the agreement has been decreed, and a grant of lands subject to making such roads, ways and slips for cattle as might be necessary: **Sanderson v. Cockermouth Workington Ry. Co.**, 11 Beav. 497; or a covenant not to build any building higher than 18 feet within a distance of 80 feet from plaintiff's houses: **Lloyd v. London, Chatham and Dover Ry. Co.**, 2 D.J. & S. 568, may be the basis for similar relief; and in all these cases the possible detriment to the railway was considered to be no answer to a demand for the enforcement of a covenant deliberately made for valuable consideration. In **Bickford v. Chatham**, 10 O.R. 257, 14 A.R. 32, and 16 S.C.R. 235, these questions were much discussed, and a majority of the judges decided that an agreement to construct a freight and passenger station, with all necessary accommodation, connected by switches, sidings, or otherwise, with another road, was not complied with by the erection of a station not used or intended to be used, and for which the usual officers, such as station master, etc., were not provided, and that the words "all necessary accomodation" required that grounds and yards sufficient for freight and passenger traffic in case the station were used, should be provided. Strong, J., in that case also, held that the words employed did not amount to a covenant to run trains to that station or make any other use of it; see 16 S.C.R. at pp. 279, *et seq.* The words "erect, set up and construct a station" do not impose an obligation to use it after it has been built: **Wilson v. Northampton Ry. Co.**, 9 Ch. App. 279, and "to make, form and construct, and thereafter maintain so long as the same shall be of convenience, a siding connected with their railway at B, together with all necessary approaches thereto, for public use for the reception and delivery of goods, wares, merchandise, and other matters, and things to and from the surrounding neighborhood," does not mean to make a "siding with all proper conveniences connected therewith," and does not lay any obligation upon a railway company to build sheds in addition to the siding: **Lytton v. Great Northern Ry. Co.**, 2 K. & J., 394. These cases seem to suggest that where specific performance is asked, the minimum of relief will be granted, and no more will be decreed in the plaintiff's favour than the very words of the contract call for. It may be that where damages are granted, a more

liberal view will be adopted. In British Columbia it has been held in a judgment given upon a demurrer, that the fact of an injunction having been granted restraining the further prosecution of the work agreed to be done is a good defence to an action brought for damages for non-performance of the contract; **Attorney-General v. C.P.R.** 1 B.C.R., Part II., 350; **Attorney-General for British Columbia v. C.P.R.**, 8 C.R.C. 346.

3. **Whether a covenant is perpetual or temporary** depends again upon the construction of each particular contract. The rule may be stated in general terms to be that there is no principle or policy of the law which will prevent such a covenant from being construed as perpetual, if apt words are used, but unless the wording or the context absolutely requires it, such contracts, if lived up to in good faith for a reasonable period, will not be construed as perpetually binding upon a railway company where, in the course of time, new conditions or a proper change of policy in the management of the road call for a departure from the contract: **Toronto v. Ontario and Quebec Ry. Co.**, 22 O.R. 344, citing **Texas Ry. Co. v. Marshall**, 136 U.S.R. 393. For instance, in **Geauyeau v. Great Western Ry. Co.**, 25 Gr. 62, 3 A.R. 412, a covenant to establish a station does not mean to permanently establish and maintain one, nor has a covenant to "place" a station any more extended effect: **Jessup v. G.T.R.**, 7 A.R. 128; but a covenant to "erect, keep and maintain . . . a permanent freight and passenger station" was, in **Township of Wallace v. Great Western Ry. Co.**, 25 Gr. 86, 3 A.R. 44, construed as perpetual.

These three cases and that of **Bickford v. Town of Chatham**, 14 A.R. 32, 16 S.C.R. 235, were reviewed in **Nottawasaga v. Hamilton and North-Western Ry. Co.**, 16 A.R. 52, where it was held again that the word "establish" does not mean to permanently maintain, that a consent judgment to restrain defendants from ceasing to maintain stations which they had agreed to maintain for seven years does not extend their liability beyond the seven years, and that evidence of verbal statements made by directors that the agreement was intended to be perpetual was inadmissible. Where there is, however, a definite condition in a bond to remain independent for twenty-one years, and within that period the railway amalgamates with another, there is a clear breach of the condition, and the amount secured by the bond being the amount paid to defendants, was recovered as liquidated damages: **Halton v. G.T.R.**, 19 A.R. 252, 21 S.C.R. 716.

In **Texas Railway Co. v. Marshall**, 136 U.S.R. 393, a covenant to "permanently establish" a terminus at the city of Marshall was held to be satisfied by establishing its works there "in the ordinary course of its business, with the purpose that it should be permanent," even though subsequent events rendered a change of policy and a removal of its terminus necessary in the best interests of the road; and this principle has been adopted in **Toronto v. Ontario and Quebec Ry. Co.**, 22 O.R. 344, already cited.

4. **Whether a covenant by a railway company has been waived by the parties or annulled by subsequent legislation.** The parties to a contract may, of course, by express words, waive their rights under it, and a similar result follows where an intention to waive can be gathered from their acts, and so where an agreement called for a first-class station, and the plaintiff or his predecessors saw the building put up and made no objection then or for several years after, it was held that he was precluded from showing that some other kind of station was intended: **Hood v. North-Eastern Ry. Co.**, L.R. 8 Eq. 666, 5. Ch. App. 525. As to the abrogation of such contracts by subsequent legislation, there is nothing in the Canadian constitution to prevent a legislature, in whom the general right of legislating upon a question is vested, from annulling a contract already made, unless it be the general powers of disallowance contained in the British North America Act, and so we have no need to discuss the constitutional question so often debated in the United States (see, for instance, 25 American Law Register, 81), but, at the same time, where amalgamations, consolidations or re-arrangements are entered into and legalized by statute, all existing liabilities are generally expressly saved, so that while railway companies have pleaded that their obligations have been annulled by special Act, this defense has not been judicially upheld. See particularly **Cayley v. Cobourg, Peterborough and Marmora Ry. Co.**, 14 Gr. 571; **Attorney-General v. Birmingham**, 15 Ch. D. 423, and **Fargey v. Grand Junction Ry. Co.**, 4 O.R. 232. The rule laid down by Mr. Justice Osler, at p. 243 of this case, is that "where the terms of a statute are not imperative, but, as here, optional or permissive, the fair inference is that the Legislature intended that the discretion as to the use of general powers thereby conferred, should be exercised in strict conformity with private rights:" see also **Edinburgh and Glasgow Ry. Co. v. Campbell**, 9 Law Times N.S. 157, 4 Macq. H.L. 570.

5. **Whether mandamus, injunction, specific performance, or damages is the proper remedy.** The writ of mandamus is a command issuing in the King's name to perform a plain legal duty, and is usually employed only where no other sufficient remedy can be had in the Courts. Where, as is frequently the case, agreements in which railways are concerned are legalized and validated by statute, there is not only a binding duty but a legal obligation imposed, and in such cases where there is a speedier and more ample remedy by writ of mandamus, that has been granted in lieu of damages: **Ex p. The Attorney-General of New Brunswick, Re The New Brunswick and Canada Ry. Co.**, 17 N.B.R. 667; but where an equally efficient remedy may be had in an action, a writ of mandamus will not be granted: **Dubuc v. Montreal and Sorel Ry. Co.**, 7 L.N. 5. Or where the applicant has an adequate remedy under the Railway Act for the purpose of enforcing the terms of the Special Act, **Re Robertson v. Grand Trunk Ry. Co.**, 6 C.R.C. 490; affirmed **G.T.R. v. Robertson**, 39 S.C.R. 506 [1909], A.C. 325, 7 C.R.C. 267, 9 Can. Ry. Cas. 149. For an interesting article on the history of this proceeding and its extension in modern times, see 102 Law Times Journal, p. 420.

In Ontario, where debentures were issued under the provisions of a statute, a mandamus was granted upon the application of creditors, who became entitled to the debentures upon the company's default in paying advances, for registration as holders of the debentures so as to enable them to vote: **Re Thomson and the Victoria Ry. Co.**, 8 P.R. 423; also see **Osler v. Toronto, Grey and Bruce Ry. Co.**, 8 P.R. 506; **Re Johnson v. Toronto, Grey and Bruce Ry. Co.**, *ibid.*, p. 535.

It has been stated by Mr. Justice Gwynne, in **Grand Junction Ry. Co. v. Peterborough**, 8 S.C.R. at pp. 121, *et seq.*, that the prerogative writ of mandamus is not in Ontario applicable as a remedy to enforce specific performance of what are in effect mere personal contracts, even though validated by statute, and that such relief must be obtained in an action, and this decision was followed in **Canada Atlantic Ry. Co. v. Cambridge**, 3 O.R. 291, **Corbett v. South-Eastern Ry. Co.**, *ante*. But in **Kingston v. Kingston, etc., Electric Ry. Co.**, 28 O.R. 399, 25 A.R. 462, it was decided that the prerogative writ of mandamus can only be obtained on a motion and not in an action, and that it is not a remedy which can be employed to enforce rights under a contract, even though the contract has received legislative sanction: **Re London, Huron and Bruce Ry. Co.**, 36 U.C.R. 93; **Re Hamilton and**

North-Western Ry. Co., 39 U.C.R., at p. 111, and **Kingston v. Kingston, etc., Ry. Co.**, 25 A.R., at p. 469.

Injunction or Damages. The general principles upon which the Courts act in granting or refusing an injunction (mandatory or otherwise), were discussed in **Shelfer v. London Electric Lighting Co.** (1895), 1 Ch. 287 at p. 322; **Taylor v. Collingwood**, 3 O.W.R. 368; **Cadwell and Fleming v. C.P.R.**, 28 D.L.R. 190, 37 O.L.R. 412, 422, and the following general rules laid down by A. L. Smith, L.J., bear sufficiently upon our subject to be quoted: (1) If the injury to the plaintiff's legal right is small; (2) and is capable of being estimated in money; (3) is one which can be adequately compensated by a small money payment; (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, damages in lieu of an injunction may be awarded.

If these four requirements are found in combination in a case, then damages in substitution for an injunction may be given.

There is a fifth general rule well illustrated by the case of **Kingston v. Kingston, Portsmouth and Cataraqui Electric Ry. Co.**, 28 O.R. 399, 25 A.R. 462, where the Court would not grant a mandatory injunction to compel a railway to run cars over the whole of its line during the whole of the year, because it could not see to the enforcement of such a decree in all its details: see also **Bickford v. Town of Chatham**, 16 S.C.R. 235, where the same rule was laid down. In **Wilson v. Northampton, etc., Ry. Co.**, L.R. 9 Ch. 279, defendants frankly admitted their breach of a covenant to erect a station and other works and offered to pay damages, but resisted plaintiff's claim for an injunction. The Court, while condemning the defendants' conduct as a breach of faith, directed an inquiry as to damages on the ground that in this way justice could better be done to the plaintiff than by a decree for specific performance, as the terms of the contract were indefinite, and the Court by specific performance could only give the plaintiff the very minimum of what was expressed, whereas in an inquiry as to damages, everything might be presumed in favor of the plaintiff. The principles invoked in these cases are laid down also in **St. Thomas v. Credit Valley Ry. Co.**, 7 O.R. 332, where plaintiffs sought to compel defendants to run to a certain point in St. Thomas pursuant to agreement, but this was held unenforceable and damages were given instead, and in **Brussels v. Ronald**, 11 A.R. 605, at p. 614.

On a subsequent occasion (**St. Thomas v. Credit Valley Ry. Co.**, 15 O.R. 673), it was held that the measure of damages which the city might recover for breach of this agreement would not include personal loss or inconvenience suffered by travellers or citizens, nor damages for depreciation of property, but would include damages for loss of taxes arising from such depreciation.

The English cases in which an injunction or specific performance were granted were reviewed by MacLennan, J.A., in his dissenting judgment in **Kingston v. Kingston, etc., Electric Ry. Co.**, 25 A.R. at p. 472, *et seq.* It may be noted that specific performance or an injunction is more readily granted where something is to be done off the line of railway, while damages are the more frequent form of relief where the other remedies would interfere with the operation of the road. In **Sanderson v. Cockermouth Ry. Co.**, 11 Beav. 497, specific performance of a contract to construct and maintain roadways and slips for cattle was decreed. In **Lytton v. Great Northern Ry. Co.**, 2 K. & J. 394, a similar decree was made for the construction of a siding with approaches. In **Lindsay v. Great Northern Ry. Co.**, 10 Hare 664, a company was restrained from passing a station without stopping, and see also **Rigby v. Great Western Ry. Co.**, 2 Ch. App. 44. In **Hood v. North Eastern Ry. Co.**, 8 Eq. 666, 5 Ch. 525, and **Wallace v. Great Western Ry. Co.**, 3 A.R. 44, railway companies were ordered to erect stations. In **Wilson v. Furness Ry. Co.**, 9 Eq. 28, a road and wharf, and in **Raphael v. Thames Valley Ry. Co.**, 2 Ch. 147, a road and approaches were ordered to be built, and in **Storer v. Great Western Ry. Co.**, 2 Y. & C. Ch. 48, an archway was ordered to be built pursuant to a contract in that behalf, but where there was a contract to erect a station with switches, sidings and all necessary accommodation, and to keep a stationmaster and other officers there, and to stop all ordinary trains there, and use that station as the main station, it was held that such an agreement could not be specifically enforced: **Bickford v. Chatham**, 10 O.R. 257, 14 A.R. 32, 16 S.C.R. 235.

By section 35 originally enacted in 1909, cap. 32, sec. 1, the Board is empowered in case of the breach of an agreement between the railway company and any corporation or other person aggrieved to hear the complaint and in its discretion to direct the company or such corporation or person to do such things as are necessary for the proper fulfilment of the agreement or refrain from such acts as constitute a violation or breach thereof. See **City**

of **Montreal v. G.T.R.**, 25 C.R.C. 448, where the Board in the exercise of its judicial discretion as an administrative body refused to order the restoration of a train service between Cote St. Paul and Montreal, but preserved the applicant's right to apply to the civil courts.

The Taking and Using of Lands.

189. (1) No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council. Crown lands

(2) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway which have not been granted or sold, as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works. Consent.

(3) The company may not alienate any such lands so taken, used or occupied. May not alienate.

(4) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust. R.S., c. 37, s. 172. In trust.
Compensation.

This section enables a railway company to acquire an absolute title to lands within the language of the enactment, and not a mere right of occupation and user: **Vancouver v. C.P.R.**, 23 S.C.R. 1. In that case the railway was authorised under its private Act to "take, use and hold" the beach and land below high-water mark. The words "take and appropriate" would probably be construed in the same way. The practise is for the Crown to grant an absolute patent of the land required.

The Dominion Parliament has power under sections 91 and 92 of the B.N.A. Act to appropriate provincial Crown lands: **Attorney-General for B.C. v. C.P.R.** (1906) A.C. 204.

In exercising this right of appropriation a railway company may obstruct and interfere with the right of the public to access to the shore for the purposes of navigation; except perhaps (*obiter*) where such access is claimed to a place which law or usage points out for such purposes: **Vancouver v. C.P.R.**, *supra*. This *obiter dictum* is a contradiction in terms, and in **Attorney-General for B.C. v. C.P.R.**, *supra*, it was held that a railway company exercising these powers may even obstruct any rights of passage by streets or rights of way previously existing: **C.P.R. v. City of Toronto and G.T.R.** (Toronto Viaduct Case), 12 C.R.C. 378, (1911), A.C. 461, does not over-rule the above two cases, as it was held that under the state of facts in that case the right of the public to gain access to the harbour and its waters was preserved to them unabated.

The taking of lands under this section is not by expropriation, *i.e.*, without the consent of the owner, but by appropriation, or as a matter of grace on the part of the Crown. Consequently the railway company is not confined to the width of right of way, designated in sec. 199, when taking Crown lands other than the public beach or land covered with water. The provisions of sec. 190, make this still more clear.

A Dominion Order-in-Council was made under this section (then section 172) 22nd May, 1912, authorising the acquisition by the Canadian Pacific Railway Company of part of the old Central Prison grounds at Toronto owned by the Province of Ontario. The order contains the following recital: "And whereas it being a question whether an Order in Council would be in order, the land being provincial Crown land, the matter was referred to the Department of Justice, who advised that the said section, in its broad interpretation, applied to provincial as well as to Dominion lands, both being vested in the Crown; that the applicants might, therefore, require the consent of the Governor in Council before they could take possession of the land, but that they should be left to settle the question of compensation with the Provincial Government and that failing such settlement the compensation should be determined in the usual way under the Railway Act. They observed that the Dominion Government had no interest except as to the mere statutory condition of consent. They suggested, however, that it would be expedient to ascertain whether the provincial Government had any objections to offer." The order goes on to recite the special circumstances con-

nected with the application and on the recommendation of the Department of Justice and the Minister of Railways gives consent to the acquisition of the lands "subject to all the rights, whatever they may be, of the Provincial Government in the matter."

Public Beach and Waters.

190. The extent of the public beach, or of the land covered with the waters of any river or lake in Canada, taken for the railway, shall not exceed the quantity hereinafter limited in the case of lands which may be taken without the consent of the owner. R.S., c. 37, s. 173.

Public
beach and
lands covered
with water.

It is submitted that sections 189 and 190 apply only to navigable waters and not to lakes, rivers and streams, the bed of which is owned by the owner of adjacent lands. See cases cited under sec. 221, re compensation for the construction placed on former statutes, 14 and 15 Vict., cap. 51, 16 Vict., cap. 169, sec. 8, etc. See **Booth v. McIntyre**, 31 U.C.C. P. 183.

Naval and Military Lands.

191. (1) Whenever it is necessary for the company to occupy any part of the lands belonging to the Crown reserved for naval or military purposes, it shall first apply for and obtain the license and consent of the Crown, under the hand and seal of the Governor General.

Naval or
military
lands.

(2) No such license or consent shall be given, except upon a report first made thereupon by the naval or military authorities, in which such lands are for the time being vested, approving of such license and consent being so given.

License or
consent.

(3) The company may, with such license and consent, at any time or times enter into and enjoy any of the said lands for the purposes of the railway. R.S., c. 37, s. 174.

Entry.

Former sec. 174.

Sub-sec. (3) appears to except Crown lands reserved for naval or military purposes from the power to take and appropriate Crown lands granted by sec. 189 (2) and to give a railway company only a right of user, the exigencies of national defence being superior to the right of the public to travel.

Indian Lands.

Indian lands.

192. (1) No company shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council.

Consent.

(2) When, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any railway company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner. R.S., c. 37, s. 175. Am. 3.

“Railway” has been inserted before “company” in the third line of sub-sec. 2 by amending former section 175.

See R.S.C., cap. 81 (The Indian Act), sec. 46. Probably the right under this section is only a right of occupation, and compensation is payable for the railway passing through or causing injury to the reserve or the doing of any act occasioning damage done under the authority of this or a Special Act (R.S.C., cap. 81, sec. 46). In any case, Indian lands cannot be sold to a purchaser direct, but must first be surrendered to the Crown, *ibid.*, sec. 48.

Other Railways.Lands of
other com-
panies.Use of
tracks, etc.Approval of
Board.Procedure
therefor.

193. (1) The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right of way, tracks, terminals, stations or station grounds of any other railway company, and have and exercise full right and power to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Board first obtained and to any order and direction which the Board may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

(2) Such approval may be given upon application and notice, and, after hearing, the Board may make such order, give such directions, and impose such conditions or duties upon either party as to it may appear just or desirable, having due regard to the public and all proper interests.

(3) If the parties fail to agree as to compensation, the Board may, by order, fix the amount of compensation to be paid in respect of the powers and privileges so granted. R.S., c. 37, s. 176. Compensation.

(4) Where the proposed location of any new railway is close to or in the neighborhood of an existing railway, and the Board is of opinion that it is undesirable in the public interest to have the two separate rights of way in such vicinity, the Board may, when it deems proper, upon the application of any company, municipality or person interested, or of its own motion, order that the company constructing such new railway shall take the proceedings provided for in sub-section (1) of this section to such extent as the Board deems necessary in order to avoid having such separate rights of way. Board may order proceedings.

(5) The Board, in any case where it deems it in the public interest to avoid the construction of one or more new railways close to or in the neighborhood of an existing railway, or to avoid the construction of two or more new railways close to or in the neighborhood of each other, may, on the application of any company, municipality or person interested, or of its own motion, make such order or direction for the joint or common use, or construction and use, by the companies owning, constructing or operating such railways, of one right of way, with such number of tracks, and such terminals, stations and other facilities, and such arrangements respecting them, as may be deemed necessary or desirable. **New.** Joint use of tracks, etc.

Former sec. 176; but sub-sections (4) and (5) providing that where the public interest demands it only one right of way shall be constructed for those parts of an existing railway or a new railway which lie close together, are new.

Lands granted to a railway company as subsidies are not within the section, and must be paid for as if they belonged to private individuals, and not as lands conveyed to the railway company for railway purposes: **C.P.R. v. G.T.P. Ry. Co.**, (Subsidy Lands Case), 21 C.R.C. 95.

The Board decides under sub-secs. 2 and 3 the conditions on which the right-of-way over lands of another company, or the use of its tracks, may be obtained, and the question of compensation.

The Board may authorise one railway company to occupy and use the lands of another, even to the serious loss and detriment of the latter, due compensation being made therefor; but care should be taken to avoid such injury except where the public interest imperatively demands it. In **Re Guelph and Goderich Ry. Co. and G.T.R.**, 6 C.R.C. 138; **Qu'Appelle etc., Ry. Co. v. C.P.R.**, 13 C.R.C. 131, 21 W.L.R. 628. Transfer of cars of one company over the tracks of another company does not constitute a user of the latter's property under this section. **London Inter-Switching Case**, 6 C.R.C. 327.

On the application of a company incorporated solely under provincial laws the Board cannot authorise such a company to take the lands of a company which is within the scope of the Dominion Railway Act without the latter's consent. **Preston & Berlin Street Ry. Co. v. G.T.R.**, 6 C.R.C. 142; **St. John Ry. Co. v. C.P.R.**, 14 C.R.C. 360; 17 C.R.C. 334; 20 D.L.R. 914; **Montreal, etc., Ry. Co., v. Lachine Ry. Co.**, 18 C.R.C. 122; 50 S.C.R. 84; **Lachine Ry. Co. v. Montreal Tramways Co.**, 18 C.R.C. 133.

But query as to whether such an order could be made on the application of a municipality or rate payer or by the Board's own motion, if the public safety required it.

Compare the similar provisions of sec. 252, sub-sec. 2, sub fin., in the case of the crossing of one railway by another and see **C.P.R. v. Bay of Quinte Ry. Co.**, 3 O.W.R. 542 and 658, where under the special circumstances of the case, an order having been made by the Governor in Council for an immediate crossing, the Board allowed a crossing to be made before the amount of the compensation was ascertained or security given therefor.

As to whether the applicant company will be granted an absolute title to the land of another railway company, or only a right of user, see **South Ontario Pacific Ry. Co. v. G.T.R.** (Junction Cut Case), 20 C.R.C. 152.

A railway company was compelled in the public interest to continue and extend joint privileges to another railway in its station, notwithstanding failure of the latter to pay rent: **C.N.R. v. G.T.R.**, 20 C.R.C. 67.

See note, 18 C.R.C. 144, on taking by Dominion railways of lands of provincial railway companies.

Mines and Minerals.

194. No company shall, without the authority of the Board, locate the line of its proposed railway, or construct

the same or any portion thereof, so as to obstruct or interfere with, or injuriously affect the working of, or the access or adit to any mine then open, or for the opening of which preparations are, at the time of such location, being lawfully and openly made. R.S., c. 37, s. 169.

The effect of the section is confined to mines which are open, or for the opening of which preparations are, at the time of such location, being lawfully and openly made.

Placer miners are owners within the meaning of this Act and are entitled to compensation. Before a Railway Company can expropriate lands of this nature it must comply with the provisions of the Act. A placer mine is an open mine within this section: **Day v. Klondyke Mines Ry. Co.**, 6 C.R.C. 203.

195. (1) The company shall not, unless the same have been expressly purchased, be entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.

Company not entitled to minerals.

Exception.

(2) All such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby. R.S., c. 37, s. 170.

Not included in conveyance.

Former section 170, except that the word "gas" has been inserted in the third line.

The original section corresponds nearly with sec. 77 of the Ry. Clauses Consolidation Act, (1845), 8 and 9 Vic., cap. 20 (Imp.),; see **Davies v. James Bay Ry. Co.**, (1914) A.C. 1043, 19 C.R.C. 86, sub. fin.

The company may either (1) buy the land including the minerals, or (2) buy the land excepting the minerals. In the latter case the company must, under sec. 197, pay the land owner for the loss of the minerals in consequence of his being prohibited from working them by sec. 196, unless the Board allows the working of the mines under the same section.

Notwithstanding the provisions of this section the company has the right to give notice to expropriate the minerals under the land as well as the surface lands upon

its located line. Upon payment of the compensation the minerals would be "expressly purchased" within the meaning of this sub-section; the words are not to be confined to "purchased by agreement;" this provision is for the benefit, not of the mine owner, but of the company and only exempts the company from the obligation of buying the minerals together with the surface lands: **Errington v. Metropolitan District Ry. Co.**, L.R. 19, Chy. Div. 559.

There is no provision in this Act corresponding to sec. 78 of the English Railway Clauses Act (1845). Sec. 196 is probably intended to take the place of the provisions of secs. 76 to 85 inclusive of the English Act, leaving such matters to be dealt with by the Board.

For interpretation of the words "or other minerals" in a similar enactment (Ontario Railway Act, R.S.O., chap. 185, sec. 133) see in **Re McAllister and Toronto Suburban Ry. Co.**, 22 C.R.C. 272, 39 D.L.R. 207, 40 O.L.R. 252. The words in question do not apply to the ordinary rock of the country unless such rock amounts to exceptional substances which are minerals in fact applying to the word the meaning "in the vernacular of the mining world, the commercial world and landowners." The fact that there is a local market for such rock does not necessarily make it a mineral within the meaning of this section.

"A reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning:" **Hext v. Gill.**, L.R. 7 Ch. App. 699, at p. 712; **Midland Ry. Co. v. Checkley**, L.R. 4, Eq. 19.

See **Calgary etc., Ry. Co. v. King**, 73 L.J.P.C. 110; (1904), A.C. 765, re land grant from Dominion Parliament.

"Mines" in this section includes minerals whether got by underground or open working: **Midland v. Haunchwood Brick & Tile Co.**, L.R. 20 Chy. Div. 552; and therefore a bed of clay, on which the railway had been made, was a mine excepted out of the conveyance of the land to the railway company, and might be dug, unless the company were willing to make compensation to the landowner: **Earl of Jersey v. Neath Union**, L.R. 22 Q.B.D. 555; **Ruabon, etc., Co. v. G.W. Ry. Co.**, (1893), 1 Chy. 427.

So also is limestone. **Midland Ry. Co. v. Robinson**, 15 A.C. 19, but under similar words in the English Waterworks Clauses Act (1847) it was held that clay was not included under the term "minerals." **Lord Provost, etc., of Glasgow v. Farie**, 13 A.C. 657.

The claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. **Brown v. Commissioner for Railways** (1890), 15 A.C. 240. **Queen v. McCurdy**, 2 Can. Ex. C.R. 311. Nor does it follow that because a seam of coal is not presently workable at a profit that no compensation is to be given for it if it is likely to prove profitable in the future.

As to the right of a tenant of mining lands see **Re Nash and Williams and Edmonton, etc., Ry. Co.**, 21 C.R. C. 399, 36 D.L.R. 601.

As to what passes to a railway company under a conveyance it was held in the judgment of the Ontario Supreme Court (Appellate Division), in **In Re Davies and James Bay Ry. Co.**, 16 C.R.C. 78, 13 D.L.R. 912, 28 O.L.R. 544, that the company took the lands, the surface and all below, except only the minerals therein, 16 C.R.C. at p. 94. Though this point was not in controversy in the Privy Council Appeal (1914), A.C. 1043, 19 C.R.C. 86, their Lordships at page 94 of the report in 19 C.R.C. speak of the severance of the titles to the minerals and to the surface, and at page 97 say "the mine owner remains entitled to the minerals but subject to any obligation of natural support which attaches to severance." The decision of the Appellate Division may therefore be accepted as authoritative and see **Ruabon, etc. v. G.W. Ry. Co.** (1893), 1 Ch. 427, at pp. 448-457; **In re Lord Gerard and L. & N.W. Ry. Co.** (1895) 1 Q.B., at p. 464.

196. (1) No owner, lessee or occupier of any such mines or minerals lying under the railway or any of the works connected therewith, or within forty yards therefrom, shall work the same until leave therefor has been obtained from the Board.

Mining under or within 40 yards of any railway.

(2) Upon any application to the Board for leave to work any such mines or minerals, the applicant shall submit a plan and profile of the portion of the railway to be affected thereby, and of the mining works or plant affecting the railway, proposed to be constructed or operated, giving all reasonable and necessary information and details as to the extent and character of the same.

Application for leave of Board.

Protection
and safety
of the public.

(3) The Board may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seem expedient, and may order that such other works be executed, or measures taken, as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations. R.S., c. 37, s. 171.

Former sec. 171.

This section is not primarily intended to regulate the respective rights of the mine owner and the railway company expropriating, but is designed to protect the public using the company's trains from any danger that might arise from the working of the mines. Its provisions constitute the main difference between the "mines and minerals" sections of this Act and the corresponding sections of the English Railway Clauses Act, 1845 (8 & 9 Vict., ch. 20, secs. 77 to 85). Under the English Act, so far as concerns mines and minerals under the railway, or within the prescribed distance, which is normally forty yards on each side, the company is deprived of the natural right to support which it would have under an ordinary conveyance. Unless it has expressly purchased the minerals the owner may work them in the fashion which is usual in the district and even by open working in a way which may destroy the railway. He may let down the surface for the natural right of support has been taken from its owner. But he must before working give the company thirty days' notice of his intention, and the company may, then or thereafter, if it is willing to pay compensation, give him a counter notice and so, on paying compensation, stop the working. Compensation for minerals cannot be claimed until such counter notice is given: **Davies v. James Bay Ry. Co.** (1914), A.C. 1043; and 19 C.R.C. 86 at p. 93. Under the Canadian Act the railway company which acquires the surface is not, as by the English Act, deprived of the natural right to support for subjacent and adjacent minerals. It was on the other hand, before the enactment of sec. 197, *infra*, put on terms to compensate the mineral owner at once for loss of value arising from the liability which rested on him to support the railway after severance of the titles to the minerals and to the surface; (19 C.R.C. at p. 94).

Under this section, the mine owner may not work the minerals as of right, but must obtain permission from the Board. The Board is to regulate the exercise by him of

his remaining rights in the future and the primary purpose of the intervention of the Board is to be the protection, not of the mineral owner or of the railway, but of the public; 19 C.R.C. at p. 97.

In a former edition it was pointed out that there seemed to be no provision for a case where, on account of the working of the mine being dangerous, the Board should refuse to grant leave to work it upon any terms, and doubt was expressed as to the right of the owner to compensation in consequence. In the **Davies Case** the Privy Council did not think it necessary to decide whether any power could be found in the Act which enabled the Board to await the owner of mines and minerals who had applied to it for leave to work, compensation by reason of the Board having restricted his liberty in the interest of the public. The present sec. 197 was not then in force however, **q.v., infra**.

For an excellent collection of cases dealing with the principles of compensation and the relative rights of a mine owner and a railway company under the analogous sections of the English Railway Clauses Act, 1845 (8 & 9 Vict., ch. 20, secs. 77 to 85); see **In Re Davies and James Bay Ry. Co.**, 16 C.R.C. at pp. 87-89, 13 D.L.R. at p. 921, 28 O.L.R. at p. 553.

As to the common law right to support, see **Elliott v. N.E. Ry. Co.**, 10 H.L. Cas. 333; **G.W. Ry. Co. v. Cefn. Cribbwr Brick Co.**, L.R. (1894), 2 Ch. 157.

197. The company shall, from time to time, pay to the owner, lessee, or occupier of any such mines such compensation as the Board shall fix and order to be paid, for or by reason of any severance by the railway of the land **lying over such mines**, or because of the working of such mines being prevented, stopped or interrupted, or of the same having to be worked in such manner and under such restrictions as not to injure or be detrimental to the railway, and also for any minerals not purchased by the company which cannot be obtained by reason of the construction and operation of the railway. **New.** (See **Ontario Statute** 1913, c. 36, s. 135-7).

Board may
order com-
pensation in
certain cases.

This new section provides for making compensation to the land owner (1) for severance merely of his mining location, (2) for prevention, stoppage or interruption of working either under the railway or **presumably within**

the forty yard limit, and perhaps beyond it, and (3) for minerals not purchased by the company and which cannot be worked by reason of the construction and operation of the railway.

Compensation for the lands lying over mines and minerals and for mines and minerals was formerly determined in an arbitration under the sections corresponding to sections 164 and 215 **et seq.** of the present Act. Compensation and damages could be awarded in such an arbitration both for the land taken and for injury to the remainder of the owner's land. As to compensation for minerals the law as it then stood was stated in **Davies v. James Bay Ry. Co.** (1914), A.C. 1043, 19 C.R.C. 86; (at p. 94), to be that the railway company was required to compensate the mineral owner at once for loss of value arising from the liability which rested on him to support the railway after severance of the titles to the minerals and to the surface, and at p. 96 their Lordships interpret the expropriation sections as meaning that there is to be an immediate claim for compensation for the value of the lands taken and for injurious affection of any other hereditaments the title to which is affected, such as subjacent or adjacent mines and minerals. These words are wide enough to cover minerals not only under the railway and within the forty yard limit, but also minerals outside the limit, which might be necessary for the support of the railway company's lands. The present section works a radical change in the law. In the first place compensation only for the lands actually taken may at the option of the company, be awarded in an arbitration under sections 193 **et seq.** Compensation and damages to mine-owners for severance of the land lying over mines or for mines or minerals is to be fixed by the Board; as and when the claim therefor arises and the right to such compensation is not absolute, but is subject to being ordered to be paid by the Board. Under the former Act and following the decision in the **Davies Case**, compensation for the loss of minerals was payable at once and was fixed as of the date of the deposit of the plan, profile and book of reference. It was pointed out in that case (19 C.R.C. at p. 94), that in the case of adjacent minerals because the Board was likely to leave the mine owner comparatively free to work his mines, the initial compensation would be small; but where the minerals lay under the railway, and especially where they could not be won except by surface working destroying the railway track, the compensation awarded initially would be heavy. The meaning of the word initial is not clear, since in the same

judgment their Lordships say that the principle on which the legislature has proceeded is apparently to dispose of the claim against the company once for all on the occasion of taking the land. Assuming this to be a correct statement of the law as it then stood, the arbitrators would be left to base their calculations upon a hypothetical case. Compensation either for severance of land or for minerals is not now made when the right of way is expropriated, but is to be made "from time to time" presumably as a result of an application under sec. 196 and the actual damage sustained can then be shown; but it is submitted the company may include these matters in the expropriation notice if it desires. At any rate, this could be done if both parties consented. See note to sec. 195. In the judgment of the Appellate Division of the Supreme Court of Ontario (16 C.R.C. 92) it is said that the Board has the power, upon the application of the mine owner, to order the company to acquire such part of the minerals as in England would be covered by the counter notice of the railway company, or to put it in another form, so to support and maintain their line and to acquire the necessary land and mineral for that purpose that there would be no danger either to the public or the railway from the working of the mines. The Privy Council (19 C.R.C. at p. 98) considered that they ought not to treat that point as arising at present, and suggested considerable doubt as to the decision of the Appellate Division being correct. It is submitted that sec. 196 (3) refers only to works and structures and other precautions by physical means for the safety of the public and that the wording is too vague to be construed as an enactment enabling or directing expropriation of minerals. Under sec. 197, however, ample powers are given the Board to order compensation to be paid for minerals which cannot be obtained by reason of the construction and operation of the railway.

The costs of an application by the mine owner under sec. 196 are not damages for which compensation can be claimed. 16 C.R.C. 78 at p. 95.

198. If necessary in order to ascertain whether any such mines are being worked, or have been worked, so as to injure or be detrimental to the railway or its safety or the safety of the public, the company may with the written permission of the Board, after giving twenty-four hours' notice in writing, enter upon any lands through or near which the railway passes wherein any such mines are being worked, and enter into and return from any

Examination
of mine
workings.

such mines or the works connected therewith; and for such purpose may make use of any apparatus of such mines and use all necessary means for discovering the distance from the railway to the parts of such mines which are being worked. **New.** (See Ontario Statute, 1913, c. 36, s. 136).

This section is new, and gives a railway company full power to enter upon mining lands adjacent to the railway to ascertain whether a mine is being worked in such a manner as to endanger the safety of the railway; and to use the works connected with the mines, such as tramways, lifts, etc., for that purpose. For the exercise of this right of entry, it is not necessary that the company should have purchased or expropriated any of the land of the owner whose property is thus entered upon. It is sufficient if the mine is "near" the railway. But the words "such mines" appear to relate back to section 196, if not to sec. 195, and to impose the limitation that the entry can only be made for the purpose of ascertaining whether any mines under the railway (or at most within forty yards therefrom) are being dangerously worked.

Extent of lands that may be taken without consent.

Lands taken
without
consent.

199. The lands which may be taken without the consent of the owner shall not, subject to the provisions of the next following section, exceed,—

For right
of way.

(a) for the right of way, one hundred feet in breadth, except in places where the rail level is or is proposed to be more than five feet above or below the surface of the adjacent lands, when such additional width may be taken as shall suffice to accommodate the slope and side ditches;

For stations,
etc.

(b) for stations, depots and yards, with the freight sheds, warehouses, wharfs, elevators and other structures for the accommodation of traffic incidental thereto, one mile in length by five hundred feet in breadth, including the width of the right of way;

Interests less
than fee
simple.

Provided that no interest in land less than a fee-simple interest shall be acquired without the consent of the owner, except upon leave of the Board and upon such

terms and conditions as the Board may impose. R.S., c. 37, s. 177. Am.

The words from "subject" in the second line to "section" in the third line, and from "Provided" in the seventeenth line to the end of the section are new.

Lands dedicated to a public use under a Provincial Statute may be expropriated under this Act: **Lachine, etc., Ry. Co. v. Montreal Gas Co.**, 18 C.R.C. 438, 28 D.L.R. 382, and see **In re G.T.R. and Cities of St. Henri and St. Cunegonde**, 4 C.R.C. 277, and the opinion of Osler, J.A., in **In Re Bronson et al and the Corpn. of Ottawa**, 1 O.R., 415 at p. 430: "If powers granted for one public or quasi-public purpose, such as the construction of a railway, cannot be exercised without acquiring lands already expropriated for another public purpose, and yet may be so exercised consistently with the existence of the latter and without substantial interference therewith, the right to exercise such power exists by necessary implication."

As to the power of a Dominion railway company to expropriate the lands of a Provincial railway company, see **Lachine, etc., Ry. Co. v. Montreal, etc., Ry. Cos.**, 18 C.R.C. 133, and notes to section 170. A Provincial railway company cannot expropriate the lands of a Dominion railway company: **Attorney-General for Alberta v. Attorney-General for Canada** (1915), A.C. 363, 19 C.R.C. 153, and see note to sec. 170.

The company has no power to exceed the limit provided by this section except under the provisions of sections 201-204; the land must be taken as a whole and not in detached parcels: **Stewart v. Ottawa, etc., Ry. Co.**, 30 O. R. 599.

In **Carr v. C.P.R.**, 14 C.R.C. 40, 5 D.L.R. 208, it was held that where a railway company in the exercise of its powers took physical possession of a less width of land than it was entitled to, it would not be presumed that it had expropriated the total width to which it was entitled. The effect of this decision is now probably modified by the new section 171.

The effect of taking land under the corresponding sections of former Acts was to vest the land in the company in fee simple, not merely an easement or right of way over it. **Anglin v. Nickle**, 30 U.C.C.P. 72. **Great Western Ry. Co. v. Lutz**, 32 U.C.C.P. 166.

As to exception of minerals, see sections 194 to 198. (*supra*).

After the land is taken and the railway is completed, the power of expropriation is exhausted and authority to acquire any additional land required for the railway must be obtained from the Board under the following section 200.

Leave to take Additional Lands.

Where more ample space required.

200. (1) Should the company require, at any point on the railway, more ample space than it possesses or may take under the last preceding section, for the convenient accommodation of the public, or for the traffic on its railway, or for protection against snowdrifts, or for the diversion of a highway, or for the substitution of one highway for another, or for the construction or taking of any works or measures ordered by the Board under any of the provisions of this Act or the Special Act, or to secure the efficient construction, maintenance or operation of the railway, it may, whether before or after the railway has been opened for the carriage of traffic, apply to the Board for authority to take the same for such purposes, without the consent of the owner.

Procedure.

(2) The company shall give ten days' notice of such application to the owner or possessor of such lands, and shall, upon such application, furnish to the Board copies of such notices, with affidavits of the service thereof.

What application must include.

(3) The company, upon such application, shall also furnish to the Board, in duplicate,—

Plan, etc.

(a) a plan, profile and book of reference of the portion of the railway affected, showing the additional lands required, and certified as hereinbefore provided with respect to plans and profiles required to be deposited by the company with the Board;

Particulars to be specified.

(b) an application, in writing, for authority to take such lands, signed and sworn to by the president, vice-president, general manager or engineer of the company, referring to the plan, profile and book of reference, specifying definitely and in detail the purposes for which each portion of the lands is required, and the necessity

for the same, and showing that no other land suitable for such purposes can be acquired at such place on reasonable terms and with less injury to private rights.

(4) After the time stated in such notices, and the hearing of such parties interested as may appear, the Board may, in its discretion, and upon such terms and conditions as the Board deems expedient, authorise in writing the taking, for the said purposes, of the whole or any portion of the lands applied for.

Authority from Board.

(5) Such authority shall be executed in duplicate, and one of such duplicates shall be filed, with the plan, profile, book of reference, application and notices, with the Board; and the other with the duplicate plan, profile, book of reference and application, shall be delivered to the company.

In duplicate.

(6) Such duplicate authority, plan, profile, book of reference and application, or copies thereof certified as such by the Secretary, shall be deposited with the registrars of deeds of the districts or counties, respectively, in which such lands are situate.

Deposit with registrars of deeds.

(7) All the provisions of this Act applicable to the taking of lands without the consent of the owner for the right of way or main line of the railway shall apply to the lands authorised under this section to be taken, except sections one hundred and seventy and one hundred and seventy-two relating to the sanction by the Board of the plan, profile and book of reference of the railway, but the deposit with the Board and with the registrar of deeds shall be made as in this section provided.

Provisions of this Act which apply.

(8) The Board may, upon consent in writing having been first obtained from the Minister in that behalf, repeal, rescind, change or vary any certificate of the Minister made under section one hundred and nine of **The Railway Act, 1888, c. 29, R.S., c. 37, s. 178.** Am.

Repeal and change of certificates made under 1888, c. 29, s. 109.

Former section 178.

The words "whether before or after the railway has been opened for the carriage of traffic" have been added in sub-sec. 1.

Sub-sec. 7, after the word "except," formerly read as follows: "the provisions relating to the sanction by the Board of the plan, profile and book of reference of the railway, and the deposit thereof when so sanctioned, with the Board and with registrars of deeds."

If the provisions of this section are strictly complied with, the company is entitled to acquire the lands covered by the application unless it is established that the application is not **bona fide**, and that the railway company does not need, for the purposes of the public, the lands sought to be taken, or that it is acquiring them for some ulterior purpose: **C.P.R. v. Coquitlam Landowners**, 13 C.R.C. 25; but the Board may in its discretion impose terms as a condition of granting the order.

An extensive tract of land in Toronto was devastated by fire and shortly afterwards the Grand Trunk Railway Company took proceedings to expropriate the land for station purposes under the corresponding section in the Act of 1903. The Board held that it might consider future traffic on the railway and future accommodation for the public. In dealing with the subject of compensation the Board may order the railway company to do any act whatever including the payment of money in addition to the compensation ordinarily allowed under the statute, but any such additional compensation should only be rarely allowed. In this case the owners of the land delayed rebuilding pending the result of the application for leave to expropriate. It was held that they were not entitled to compensation for loss of business between the time of the fire and the making of the award, but that they were entitled to interest from the date of such application. **The Burnt District Case, Toronto**, 4 C.R.C. 290. See also **Eckardt v. G.T.R.**, 7 C.R.C. 90.

The Board, under sec. 170 or sec. 200, may authorise expropriation of land of a provincial railway; but will consider whether such expropriation would be in the public interest: **Lachine Ry. Co. v. Montreal Tramways Co.**, 18 C.R.C. 133;; **C.N.W. Ry. Co. v. C.P.R.**, 16 C.R.C. 105, 13 D.L.R. 624. See note as to taking of lands of provincial railways by Dominion Railways, 18 C.R.C. 144.

Using Lands for Special Purposes.

201. (1) The company, either for the purpose of constructing or repairing its railway, or for the purpose of carrying out the requirements of the Board, or in the exercise of the powers conferred upon it by the Board, may

Use of
adjoining
lands.

enter upon any land which is not more than six hundred feet distant from the centre of the located line of the railway, and may occupy the said land as long as is necessary for the purposes aforesaid; and all the provisions of law at the time applicable to the taking of land by the company, and its valuation, and the compensation therefor, shall apply to the case of any land so required.

(2) Before entering upon any land for the purposes aforesaid, the company shall, in case the consent of the owner is not obtained, pay into the office of one of the superior courts for the province in which the land is situated,—

If owner
does not
consent.

(a) such sum, as is, after two clear days' notice to the owner of the land, or to the person empowered to convey the same, or interested therein, fixed by a judge of such superior court; and,

Sum to be
deposited.

(b) interest for six months upon the sum so fixed.

Interest.

(3) Such deposit shall be retained to answer any compensation which may be awarded the person entitled thereto, and may upon order of a judge of such court, be paid out to such person in satisfaction **pro tanto** of such award, and the surplus, if any thereafter remaining, shall, by order of the judge, be repaid to the company.

As security
for compen-
sation.

(4) Any deficiency in such deposit to satisfy such award shall be forthwith paid by the company to the person entitled to compensation under such award. R.S., c. 37, s. 179.

Deficiency
to be paid.

Former sec. 179, with the word "the" substituted for "any" before the word "time" in the ninth line of subsec. (1).

The language of this section makes clear that the ascertainment of the probable amount of compensation and its payment into court is a condition precedent to the exercise of this right.

Where leave of the Board is required under this section and a railway proceeds to construct a siding over lands and through a highway without obtaining such leave a municipality having control of the highway may

obtain an injunction restraining such interference: *Innisfil v. G.T.R.*, 6 O.W.R. 69. But where a railway company obtains the necessary order from the Board it can lawfully expropriate the lands or property of a municipality. *Re G.T.R. and Ste. Henri*, 41 Can. L.J. 567; 4 C.R.C. 277.

The payment into court under this section differs from that under sections 240 and 241, providing for a warrant for immediate possession where no award or agreement has been made as to the amount of compensation. Under these latter sections the payment into court is made only as security while payment under section 201 is intended to be in satisfaction of the compensation itself, or some part thereof. The difference is important in view of the decisions as to interest. It is submitted that if an award is not made under this section until after six months from the date of payment into court the company would not be responsible for interest upon the sum paid into court other than allowed by the court.

202. (1) Whenever,—

Obtaining
materials for
construction
or operation.

(a) any stone, gravel, earth, sand, water or other material is required for the construction, maintenance or operation of the railway, or any part thereof; or,

Transport.

(b) such materials or water, so required, are situate, or have been brought to a place at a distance from the line of railway, and the company desires to lay down the necessary tracks, spurs or branch lines, water pipes or conduits, over or through any lands intervening between the railway and the land on which such materials or water are situate, or to which they have been brought;

Tracks or
conduits.

Plan and
description.

the company may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed to act in the province, or an engineer, to make a plan and description of the property or right of way, and shall serve upon each of the owners or occupiers of the land affected a copy of such plan and description, or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer.

(2) All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the materials or water, so required, or the right of way to the same, irrespective of the distance thereof: Provided that the company shall not be required to submit any such plan for the sanction of the Board.

Provisions of
this Act
which apply.

(3) The company may, at its discretion, acquire the lands from which such materials or water are taken, or upon which the right of way thereto is located, for a term of years or permanently.

Title may be
acquired.

(4) The notice of arbitration, if arbitration is resorted to, shall state the extent of the privilege and title required.

Arbitration.

(5) The tracks, spurs or branch lines constructed or laid by the company under this section shall not be used for any purpose other than in this section mentioned, except by leave of the Board, and subject to such terms and conditions as the Board sees fit to impose.

Tracks not
to be used
for other
purposes.

(6) The Board may restrict or forbid the exercise of any power under this section. R.S., c. 37, s. 180. Am.

Power of
Board.

Sub-sec. (6) is new.

Compensation for land or materials taken under this section is to be fixed as of the date of taking possession by the company, and not as of the date of filing the plan, profile and book of reference: **Saskatchewan Land and Homestead Co. v. Calgary, etc., Ry. Co.**, 16 C.R.C. 114, 14 D.L.R. 193, 6 Alta. L.R. 471, affirmed 19 C.R.C. 126, 21 D.L.R. 172, 51 S.C.R. 1. No plans need be submitted to the Board or deposited as in the case of right of way, *ibid*.

Under the provisions of the Railway Act of 1888 it was held in **Watson v. Northern Ry. Co.**, 5 O.R. 550, that the Northern Railway had no power to take land for the purpose only of obtaining gravel. The provisions of the present section are clear upon this point. In **Vezina v. The Queen**, 17 S.C.R. 1, it was held that where land is taken by a railway company for the gravel thereon, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel. In **Township of Brock v. Toronto & Nipissing Ry. Co.**, 37 U.C.R. 372, the defendants were obliged to

pay for materials taken by them, the action being for damages for trespass. The expropriation clauses did not apply.

The case of **Quebec Bridge Co. v. Marie Roy**, 5 C.R.C. 18; 32 S.C.R. 572, decided that the power of expropriation under section 114 of the Act of 1888 extended only to lands adjoining the railway, and upon which nature had deposited material which could serve and could be required for the construction and maintenance of the railway. Taschereau, J., in the Supreme Court held that the railway company had no right to expropriate the land, but could only acquire a right of passage or servitude. **Quaere** as to the meaning of the words "the company may, at its discretion acquire the lands . . . for a term of years or permanently." The section is amended in its present form empowers a railway company to obtain material and water for construction, maintenance or operation from places distant from the line of railway whether naturally situate there or brought to that place by some other means. This case is therefore no longer an authority on this point.

As to property in sand and gravel on highways see **Municipality of Louise v. C.P.R.**, 3 C.R.C. 65. **C.P.R. v. Township of North Dumfries**, 6 C.R.C. 147. But now, in Ontario, see R.S.O., 1914, c. 192, sec. 433.

A railway company has no power to take water from a stream as a riparian proprietor for purposes unconnected with the tenement as for instance for use in its engines. **McCartney v. Londonderry & Lough Swilly Ry. Co.** (1904), A.C. 301, overruling **Sandwich v. Great Northern Ry. Co.**, 10 Ch. D. 707. See also **Maughn v. G.T.R.**, 4 O.W.R. 287.

A highway may be diverted for the construction of such a spur: **C.P.R. v. N. Dumfries**, *supra*; **C.L.O. & W. Ry. Co. v. Camden**, 16 C.R.C. 236.

Snow fences.

203. (1) Every railway company may, on and after the first day of November, in each year, enter into and upon any lands of His Majesty, or of any person, lying along the route or line of the railway, and erect and maintain snow fences thereon, subject to the payment of such land damages, if any actually suffered, as are thereafter established, in the manner provided by law with respect to such railway.

Compensation.

Removal.

(2) Every snow fence so erected shall be removed on

or before the first day of April then next following. R.S., c. 37, s. 182.

No agreement with, consent of or prior notice to the owner or occupant is necessary. Compensation is to be determined and paid "thereafter" on proof of actual damage to the land. The "manner provided by law" would seem to be by arbitration; see sec. 164.

Purchase and Conveyance.

204. Except as otherwise provided in section two hundred and seven, whenever the company can purchase a larger quantity of land from any particular owner at a more reasonable price, on the average, or on terms more advantageous, than those upon which it could obtain the portion thereof which it may take from him without his consent, it may purchase such larger quantity.

Purchase of more land than required.

(2) The company may sell and dispose of any part of the lands so purchased which may be unnecessary for its undertaking. R.S., c. 37, s. 181. Am.

Re-sale.

Former sec. 181, with the addition of the words "except" to "seven" in the first and second lines.

This section applies to any lands actually required for railway purposes, but not to lands taken without the consent of the owner. Compare section 207.

205. All tenants in tail or for life, **grevés de substitution**, guardians, curators, executors, administrators, trustees and all persons whomsoever, as well for and on behalf of themselves, their heirs and successors, as on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, **femes-covert** or other persons, seized, possessed of or interested in any lands, may, subject to the provisions of the next following section, contract and sell and convey to the company all or any part thereof. R.S., c. 37, s. 183.

Power of representative persons to convey.

The language of this section has been the subject of some discussion as to what persons are enabled by it to convey in fee simple. Persons coming within the language of the section, except those specifically referred to in section 207, may sell all, or any portion, of their lands. The area which the railway company may take is not confined within the limitations appearing in section 199, and

a voluntary contract seems, therefore, to be contemplated, rather than the exercise by the railway company of its powers of expropriation. Conveyance by the persons indicated is authorised "as well for and on behalf of themselves, their heirs and successors, as on behalf of those whom they represent." If these words were given merely their strict legal meaning, the statute would be narrow in its application. A tenant in tail, where there is no prior life tenant or other protector to the settlement, may convey the fee simple as he might have done without the power granted by this section. And a **grevé de substitution**, curator, guardian, executor, administrator or trustee may convey the fee simple. But where there is a protector to the settlement, a tenant in tail does not "represent" him or the remainderman, and, consequently, unless the section be given a broad interpretation, it does not enable him to bar the remainderman without consent of the protector. Tenants for life do not "represent" reversioners or remaindermen. Further, the section does not expressly enable the owner of land subject to a valid restraint upon alienation to convey unless he comes within the words "all persons whomsoever."

As to tenants for life, however, the judgment in **Midland Ry. Co. v. Young**, 22 S.C.R. 190, clearly upholds the right to convey the fee, though it denies the tenant's right to receive the whole of the compensation. The argument against the "representative" character of a tenant for life could not be put more strongly than it was put by Mr. Justice Sedgewick in that case, but he was overruled by the majority of the Court, and their judgment has been followed in numerous cases. **Re Dolsen**, 13 P.R. 84; **re C.P.R. and Byrne**, 15 O.L.R. 45; 7 C.R.C. 71; **Forbes v. Grimsby**, 6 O.L.R. 539. Similar reasoning would apply to tenants in tail.

It is difficult to suggest what meaning or effect is to be given to "all persons whomsoever." Sedgewick, J., in the **Midland Case**, dealing with the earlier and somewhat different wording of this section ("All corporations and persons whatever,") says "there is as much reason in the assertion that they represent persons entitled to reversionary interests as that life tenants represent them;" and if a wide meaning is to be given to the section on the ground that its object is "to facilitate the inexpensive and speedy acquisition of railway lands," it might be argued that Parliament intended to enable the company to deal with any person having a substantial interest in the lands, leaving other persons interested to the protection of sections 206 and 233. But, upon the same section, as copied

in the Ontario Railway Act, R.S.O. 1887, Cap. 170, sec. 13, it was held in **re Toronto Belt Line Railway**, 26 O.R. 413, that "all persons whatever" did not include a mortgagor so as to enable him to deal with more than his own equity of redemption, and that a mortgagee was entitled to have his compensation separately ascertained; and this though the Ontario Act contained a section similar in effect to section 233, *infra*. As to persons holding land subject to a restraint upon alienation, the intention of the Act to give them power to convey is made clear by section 206; sections 205 and 206 are effective to that end, if *intra vires* as to them; and the power of Parliament so as to enact seems no more open to doubt than in the case of life tenants, in which it has been expressly upheld.

Section 209 enacts that the company shall not be responsible for the disposition of any purchase money if paid to the owner of the land or into Court for his benefit. Payment to a life tenant is not payment to the owner and renders the company liable to pay again: **Cameron v. Wigle**, 24 Gr. 8; **Young v. Midland Ry. Co.**, 16 O.R. 738; 19 A.R. 265; 22 S.C.R. 190; **Owston v. Grand Trunk Railway**, 28 Gr. 428; **Latour v. G.T.R.**, *infra*. See also notes to section 209, *infra*.

Section 206 (2) provides for the investment of the purchase money to secure the interests of the owner of the land. Presumably the purchase money might be paid into Court and paid out upon an order of the Court to a guardian, curator, executor, administrator or trustee, but a tenant in tail or for life would seem to be entitled only to the interest or revenue derived from the investment ordered.

Section 211 historically and practically is properly considered with section 205, and is therefore dealt with here. It provides, "in any case not hereinbefore provided for" for an agreement for a fixed annual rent where a person interested in lands is not authorised by law to sell. The words quoted indicate that it does not apply to persons within the language of section 205, and in view of the words "all persons whomsoever" contained in that section, it is not easy to see to what classes of persons it does apply. Originally both sections appeared in one section, 14-15 Victoria, cap. 51, sec. 11, as follows: "all corporations and persons whatever, tenants in tail or for life, **grevés de substitution**, guardians, curators, executors, administrators and all other trustees whatsoever may contract for, sell and convey unto the company..... All corporations or persons who cannot in common course

of law sell or alienate.....shall agree upon a fixed annual rent as an equivalent, and not upon a principal sum, to be paid for the lands." This was construed in **Latour v. G.T.R.**, Q.R., 40 S.C. 514; 13 C.R.C. 404, to mean that a life tenant or **grevé de substitution** is authorised to contract with a railway for the sale and conveyance to the company, and is authorised to fix the price or value of the land or any portion thereof, and, if for a portion, to agree upon the amount of damages which may result to the remaining portion of the land by reason of the construction of the railway, but is not authorised to receive the principal sum agreed upon. He should receive the revenues or interest thereon during his lifetime and upon his death the principal sum should be paid to the reversioner, remainderman or substitute. Some ambiguity has been caused by the way in which these sentences have been recast and re-arranged.

Order of
judge may
be had.

206. (1) When such persons have no right in law to sell or convey the rights of property in the said lands they shall not sell or convey the same without obtaining from a judge, after due notice to the persons interested, the right to sell the said lands: Provided that where any person interested is absent from the district or county in which the lands lie, or is unknown, the judge may order such substitutional service of notice as he deems proper or may dispense with notice.

Purchase
money.

(2) The said judge shall give such orders as are necessary to secure the investment of the purchase money, in such a manner as he deems necessary, in accordance with the law of the province, to secure the interests of the owner of the said land. R.S., c. 37, s. 184. Am.

Former section 184. The provisions for substitutional service or dispensing with notice are new.

A tenant for life with remainder to her children may during their infancy obtain an order from the judge under this section. **In re Dolsen**, 13 P.R. 84. **Re C.P.R. and Byrne**, 15 O.L.R. 45; 7 C.R.C. 71. See **W. & L. Ry. Co. v. Public School Section No. 9, Glenelg**, 17 O.W.R. 885, and notes to sec. 205.

Limitation
of powers to
convey.

207. The powers by the last two preceding sections conferred upon,—

(a) rectors in possession of glebe lands in the province of Ontario;

- (b) ecclesiastical and other corporations;
- (c) trustees of land for church or school purposes;
- (d) executors appointed by wills under which they are not invested with, and have not otherwise, power to sell the real property of the testator; and,
- (e) administrators of persons dying intestate seized of real property, where such administrators have not power to sell such property;

shall only extend and be exercised with respect to any of such lands actually required for the use and occupation of the company. R.S., c. 37, s. 185. Am.

Former section 185, sub-sec. (d) amended by inserting "and have not otherwise" before "power" in second line of sub-sec. (d) and similarly in sub-sec. (e). See exception in sec. 204.

208. (1) Any contract, agreement, sale, conveyance or assurance made under the authority of any of the last three preceding sections shall be valid and effectual in law, to all intents and purposes whatsoever; and any conveyance so authorised shall vest in the company receiving the same the fee simple in the lands therein described, freed and discharged from all trusts, restrictions and limitations whatsoever.

Conveyance
to vest fee
simple.

(2) The person so conveying is hereby relieved from liability for what he does by virtue of or in pursuance of this Act. R.S., c. 37, s. 186.

Indemnity
to persons
conveying.

This section declares what shall be the result of a contract or conveyance made under the authority of the three preceding sections. It pre-supposes, however, a valid authorisation of a conveyance under section 205, and is open to the same construction as that section, *q.v.*

In *Anglin v. Nickle*, 30 U.C.C.P. 72, and *Great Western Ry. Co. v. Lutz*, 32 U.C.C.P. 166, it was held that the fee simple in the lands taken is vested in the company. Where the owner of lands agreed to give a railway company the lands required for right of way free, a subsequent owner is not entitled to recover compensation. *Thompson v. Canada Central Ry. Co.*, 3 O.R. 136. In *Bryson v. Ontario & Quebec Ry. Co.*, 8 O.R. 380, an

agreement made with a married woman without her husband's concurrence, and a conveyance of the land to the railway company was upheld.

Application
of purchase
money.

209. The company shall not be responsible for the disposition of any purchase money for lands taken by the company for its purposes, if paid to the owner of the land or into court for his benefit. R.S., c. 37, s. 187.

It was held under a former Railway Act, C.S.C., cap. 66, and 24 Vic., cap. 27, that notwithstanding similar provisions contained in that Act, although the tenant for life could sell and convey in fee simple the land required for the railway, the company was not warranted in paying to the tenant for life the full amount of the compensation agreed on; it was compelled afterwards at the suit of a person interested in the remainder to make good the amount of his interest. **Cameron v. Wigle**, 24 Gr. 8.

In **Young v. Midland Ry. Co.**, 16 O.R. 738, 19 A.R. 265, 22 S.C.R. 190, **Cameron v. Wigle** was approved, and it was held that under the similar provisions of the Act then in force, coupled with the provisions which were embodied in section 173 of the former Railway Act, R.S. C., cap. 37, that the tenant for life had no power to receive the purchase money, and the company was responsible to the heirs-at-law of the person entitled in reversion. See also **Owston v. G.T.R.**, 28 Gr. 428; **Dunlop v. Canada Central Ry. Co.**, 45 U.C.R. 74; **Scottish American Ins. Co. v. Prittie**, 20 A.R. 398.

A tenant for life may maintain an action of trespass against the defendants, who had entered, having made compensation only to the owner of the fee. **Slater v. Canada Central Ry. Co.**, 25 Gr. 363.

In an application for immediate possession under what is now section 240, it was held that a bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken." **Re James Bay Ry. Co. and Worrell et al.**, 6 O.W.R. 473, 5 C.R.C. 21.

See notes to sec. 205.

Prior
contracts.

210. (1) Any contract or agreement made by any person authorised by this Act to convey lands, either before the deposit of the plan, profile and book of reference, or before the setting out and ascertaining of the lands required for the railway, shall, if such contract or

agreement or notice thereof by caveat or otherwise, is duly registered with the proper registrar of deeds, be binding at the price agreed upon, if the lands are afterwards so set out and ascertained within one year from the date of the contract or agreement, and although such lands have in the meantime become the property of a third person.

(2) Possession of the lands may be taken, and the agreement and price may be dealt with, as if such price had been fixed by an arbitration award as hereinafter provided, and the agreement shall be in the place of an award. R.S., c. 37, s. 188. Am.

May be
carried out.

Former sec. 188. The words "arbitration award" in sub-sec. 2 read "award of arbitrators" in the former Act. The marginal note of sub-sec. 1 has been improved by substituting "prior" for "premature." The provision that notice of the contract must appear on the registered title in order to bind third parties is new. For a discussion of the law before this amendment see **Tolton v. C. P.R.**, 22 O.R. 204.

Quaere as to the effect of this amendment on the decision in **G.T.P. v. Vincent**, 2 Alta. L.R. 393, 12 C.R.C. 465.

211. (1) If, in any case not hereinbefore provided for, any person interested in any lands so set out and ascertained is not authorised by law to sell or alienate the same, he may agree upon a fixed annual rent as an equivalent, and not upon a principal sum, to be paid therefor.

Rental when
parties
cannot sell.

(2) If the amount of the rent is not fixed by agreement, it shall be fixed and all proceedings shall be regulated, in the manner in this Act prescribed. R.S., c. 37, s. 189.

How fixed.

Former sec. 189. The words "in this Act" in the last line have been substituted for "herein" as suggested in the last edition of this work. See notes to sec. 205 as to the meaning of this section.

212. Such annual rent and every other annual rent, agreed upon or ascertained, and to be paid for the purchase of any lands, or for any part of the purchase money of any lands which the vendor agrees to leave unpaid,

Rent charge-
able to
working
expenses.

shall, upon the deed creating such charge and liability being duly registered in the registry office of the proper district, county or registration division, be chargeable as part of the working expenditure of the railway. R.S., c. 37, s. 190.

Former sec. 190. The effect of making the rent and also any purchase money agreed to be left unpaid, chargeable as part of the working expenditure, coupled with the interpretation of "working expenditure" as set out in section 2, sub-section 34, and the provisions as to "working expenditure" contained in section 135 is to make this charge along with the other charges therein first liens upon the railway, and as between the various items mentioned under that head it is conceived that in case of deficiency it would be borne rateably.

An owner who has made an agreement as to the amount of compensation is entitled to enforce his claim for compensation under an award as against the company, and has a vendor's lien upon the land taken for the amount payable, with such provisions as are necessary to realize by means of a sale, but he is not entitled to an injunction to restrain the defendants from operating the railway on the lands, nor to an order for delivery up of possession: **Lincoln Paper Mills Co. v. St. Catharines, etc., Ry. Co.**, 19 O.R. 106.

Publishing Notice of Plans and Making Agreements.

Compensation or damages may be agreed for.

213. (1) After the expiration of ten days from the deposit of the plan, profile and book of reference in the office of the registrar of deeds, and after notice thereof has been given in at least one newspaper, if any published, in each of the districts and counties through which the railway is intended to pass, application may be made to the owners of lands, or to persons empowered to convey lands, or interested in lands, which may be taken, or which suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway; and, thereupon, such agreements and contracts as seem expedient to both parties may be made with such persons, touching the said lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained.

Agreements authorized.

Company may grant easement, etc.

(2) The company may at any time grant or agree to grant to the owner of any lands injuriously affected, or

likely to be injuriously affected, by the exercise of the company's powers, any easement, servitude or privilege over or in respect of the company's lands or the lands being taken by the company, and may construct and maintain or agree to construct and maintain any work for such owner's benefit; and any such agreement may be enforced by the Board, or damages may be recovered for the breach thereof in any court of competent jurisdiction.

(3) Such deposit of plan, profile and book of reference and such notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works. R.S., c. 37, ss. 191 (1), 192 (1). Am.

General
notice

Former sections 191 (1) and 192 (1) with the substitution in sub-sec. (3) of "such" for "the" in two places. Sub-sec. (2) is new.

"Persons interested in lands" includes a tenant for years. **Johnston v. Ontario, etc.**, 11 U.C.R. 246, decided that a tenant for years might maintain trespass against the defendants, who had entered, having made compensation only to the owner of the fee. See also **Detlor v. G.T.R.**, 15 U.C.R. 595; **Slater v. Canada Central Ry. Co.**, 25 Gr. 363, and see **Re C.P.R. & Byrne**, 7 C.R.C. 71; **Brown v. C.P.R.**, 42 S.C.R. 600; 10 C.R.C. 74.

The lands of a Provincial railway company upon which no grading has been done nor tracks laid may be expropriated. **C.N.W. Ry. Co. v. C.P.R.**, 16 C.R.C. 105, 13 D.L.R. 624.

Where a railway company dealt with the registered owner of land, but at the time the lands were subject to an agreement for sale, and the purchaser had registered a caveat to protect his interest, the purchaser was held to have a right of action of trespass against the railway company until he had been compensated: **Holmstead v. C.N.R. & Annable**, 19 C.R.C. 102, 20 D.L.R. 577; 7 Sask. L.R. 200; but held on appeal that damages are not assessable in such an action, if the defendants have a right by statute to do legally the very thing which constitutes the trespass. The remedy is injunction restraining the trespass and to have compensation determined under the provisions of the Railway Act, unless the company acquire title; and see **France v. Gaudet**; **Marson v. G.T.**

R.; Lloy v. Dartmouth and **Como v. C.N.R.** at end of note. Same case, 19 C.R.C. 105, 22 D.L.R. 55.

Notice should be served on the *cestuis que trustent* as well as on a bare trustee, **re James Bay R.W. Co. and Worrell**, 5 C.R.C. 21.

A placer miner is entitled to notice: **Day v. Klondike Mines Ry. Co.**, 6 C.R.C. 203, 2 West L.R. 205 and notes at p. 217 of 6 C.R.C.

A person in possession under a defective title is entitled to compensation: **Stewart v. Ottawa, etc., Ry. Co.**, 30 O.R. 599, but not if a trespasser, **Clair v. Temiscouata Ry. Co.**, 6 C.R.C. 171, 367; 1 East L.R. 524; 38 S.C.R. 230.

A mortgagee should be served as well as owner of the land subject to the mortgage or the owner of the equity of redemption; **In re C.P.R. and Batter**, 1 C.R.C. 457, 13 Man. L.R. 200; **re Belt Line Ry. Co.**, 26 O.R. 413; and **re Toronto, etc., Ry. Co. & Burke**, 27 O.R. 690; and see notes at page 484 of 1 C.R.C. and see sec. 2 (18).

The holder of a hypothèque under the law of Quebec has no claim for compensation, **Brunet v. Montreal, etc., Ry. Co.**, Q.R. 3 S.C. 445, and see Abbott on Railways, p. 243.

While the railway company is bound to compensate all persons interested in the lands, it is not within the power of the land-owner after the deposit of the location plan, etc., in any wise to affect the land thereby designated as that which the company intends to acquire for its right of way so as to interfere with the right of expropriation or to render its exercise more burdensome or less advantageous to the company: **City of Edmonton v. Calgary, etc., Ry. Co.** (1916), 53 S.C.R. 406, 22 C.R.C. 182, 30 D.L.R. 222. The date of the deposit of the plan is the date with reference to which compensation or damages for land taken are to be ascertained (see sec. 221 (2), *infra*); subsequent dealings with the land by the owner cannot affect the amount of compensation or damages to be awarded; **re Myerscough and Lake Erie, etc., Ry. Co.**, 15 C.R.C. 168, 11 D.L.R. 458, **re Billings & C.N.O.R.**, 16 C.R.C. 375, 15 D.L.R. 918.

Under this section the right to compensation has been given in the following cases:—Obstruction or deviation of a watercourse: **Anderson v. G.W.R.**, 11 U.C.Q.B. 126; **McGillivray v. Great Western Ry. Co.**, 25 U.C.Q.B. 69; **Arthur v. G.T.R.**, 25 O.R. 37; 22 A.R. 89. See also **Sarnia v. Great Western Ry. Co.**, 17 U.C.Q.B. 65; **Utter v.**

Great Western Ry. Co., 17 U.C.Q.B. 392. In this case negligence in construction was alleged.

The right to drainage of surface water does not exist *jure naturae*: **Ostrom v. Sills**, 24 A.R. 526; 28 S.C.R. 485; hence damages are not recoverable for obstructing the flow of surface water as distinct from obstructing a water-course: **Crewson v. G.T.R.**, 27 U.C.Q.B. 68; **Nichol v. Canada Southern Ry. Co.**, 40 U.C.Q.B. 583; but the flooding of an adjoining owner's land by a railway company by interference with the natural flow of surface water may result in a right to damages: **Rylands v. Fletcher**, L.R. 3 H.L. 330; **Niles v. G.T.R.**, 15 C.R.C. 73; 9 D.L.R. 379.

In **L'Esperance v. Great Western Ry. Co.**, 14 U.C.Q.B. 173, lands were sold for the purpose of the railway, previously drained by a ditch made by plaintiff. Held, no action lay for obstructing the ditch by constructing the railway, the matter being one which should have been taken into consideration at the time of the sale, or dealt with upon the arbitration.

In **Hill v. Buffalo, etc., Ry. Co.**, 10 Gr. 506, a railway company, taking over a prior undertaking, were not compelled to specifically perform an agreement with the owner, to make a culvert through their embankment, having been allowed to construct the railway without notice of the agreement, but were allowed to take arbitration proceedings, as if the agreement had not been made; but see **Tolton v. C.P.R.**, 22 O.R. 204, where it was held, a water-course having been diverted without authority, although compensation was made to the plaintiff's predecessors in title, that the equitable easement thereby created did not avail the railway company as against the plaintiff, a *bona fide* purchaser for value, without actual notice and claiming under a registered deed from the previous owner; a reference was directed to ascertain the compensation to which plaintiff would be entitled as upon an authorised diversion of the water-course. See note on sec. 210.

Alton v. Hamilton & Toronto Ry. Co., 13 U.C.R. 595, is distinguishable from the foregoing cases upon the ground that negligence was alleged therein, this allegation being held sufficient to support the verdict.

The provisions of sub-sec. (2) are new. See notes to sec. 222. There are two alternative remedies for failure on the part of the company to carry out any agreement made under this section, viz. (1) a mandatory or-

der by the Board, compelling performance, see sec. 33 (2) or (2) damages by action for non-performance.

Damages, although ascertained as at the date when the land is taken or injuriously affected under this section, are not confined to the damages accrued to such date, the whole damages may be assessed once for all as for a permanent injury: **Arthur v. G.T.R.**, 25 O.R. 37, 22 A.R. 89 (*supra*); **Parkdale v. West**, 12 App. Cas at p. 616; **North Shore R.W. Co. v. Pion**, 14 App. Cas., p. 630. And see **Yale Hotel Co., Ltd. v. Vancouver, etc., Ry. Co.**, and **Grand Forks etc., Ry. Co. v. Vancouver etc., Ry. Co.**, 9 B.C.R. 66, 3 C.R.C. 108, and note, 3 C.R.C., at p. 123.

Where a railway company enters upon lands and makes valuable improvements thereon, before depositing its plan and profile, the owner is not entitled to compensation for the improvements made by the company. The compensation stands in the stead of the lands from the date when the company takes possession and the improvements are not put on the lands of the owner. **Re Ruttan & Dreifus & C.N.R.**, 12 O.L.R. 187; 5 C.R.C. 339.

The deposit of a plan does not warrant the company taking possession without taking expropriation proceedings, and the owner may maintain an action at law in trespass: **Hanley v. T.H. & B. Ry. Co.**, 11 O.L.R. 91; 5 C.R.C. 25; **McIsaac v. Inverness Ry. Co.**, 38 N.S.R. 80; 37 S.C.R. 134; 6 C.R.C. 112, 121; **Wicher v. C.P.R.**, 16 Man. L.R. 343; 6 C.R.C. 181.

Right of action was held barred by the limitation clause, sec. 306 (1906) after one year from the acts of trespass (such as cutting timber outside the lands taken for right of way: **Lumsden v. T. & N.O. Ry. Co.**, 15 O.L.R. 469; 7 C.R.C. 156; obstructing a right of access to the sea: **Westholme Lumber Co. v. G.T.P.**, 22 B.C.R. 343, 25 C.R.C. 136, 41 D.L.R. 42) where such acts were done by reason of the construction or operation of the railway. (The limitation period is now two years; see sec. 391).

Where such damage is continuous the limitation does not apply: **Carr v. C.P.R.**, 14 C.R.C. 40; 5 D.L.R. 208; **Gauthier & Dagenais v. C.N.R.**, 19 C.R.C. 144; 17 D.L.R. 193. For continuing damage extending the time for bringing an action, see **Niles v. G.T.R.**, 15 C.R.C. 73, 9 D. L.R. 379. As to damages for such a trespass, where a railway company trespasses on land, and the whole of the plaintiff's land is taken, its value is the measure of damages; where there has been only a wrongful user for a period, the value of the estate taken, *i.e.*, a fair rental

for the term of the trespass, is the ordinary measure of damages. But the rental value of the land is not the measure of damages where special damage is alleged and proved, and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and reasonable and usual use of his land. **France v. Gaudet**, L.R. 6 Q.B. 199; **Marson v. G.T.P.**, 1 D.L.R. 850; 14 C.R.C. 26; **Lloy v. Dartmouth**, 30 N.S.R. 208.

Where, pending an action against a railway company for trespass, the company takes expropriation proceedings in respect of the land in question, the plaintiff may recover for such damages as he has sustained, apart from the compensation, which he would be entitled to claim in the arbitration, but the plaintiff's claim in respect of all matters which can properly be disposed of by the arbitrators should be determined on the arbitration: **Como v. C.N.R.**, 15 C.R.C. 46; 9 D.L.R. 683.

214. In case of disagreement between the parties, or any of them, all questions which arise between them shall be settled as hereinafter provided. R.S., c. 37, s. 191 (2). Disagree-
ment

Expropriation Proceedings.

Notice.

215. Preliminary to proceeding to arbitration to fix compensation or damages the company shall serve upon the opposite party a notice, which shall contain,— Notice of
expropria-
tion to be
served.

- (a) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described;
- (b) a declaration of readiness to pay a certain sum or rent, as the case may be, as compensation for such lands or for such damages; and,
- (c) a notification that if within ten days after the service of this notice, or, where the notice is served by publication, within one month after the first publication thereof, the party to whom the notice is addressed does not give notice to the company that he accepts the sum offered by the company, either he or the company will

be entitled to apply to have the compensation fixed by arbitration as provided in **The Railway Act, 1919**. R.S., c. 37, s. 193. Am.

Subsection (c) is new.

The words "Preliminary to proceeding to arbitration to fix compensation or damages" at the beginning of the section are new, this part of the section formerly reading merely "The notice served upon the party shall contain."

The "opposite party" is the owner or person empowered to convey, or interested in lands (see sec. 213 (1) *supra*) but the company need only serve notice of expropriation on the registered owner and in the absence of fraud may disregard an unregistered interest of which they have notice. On a subsequent registration of an interest on part of the land the holder thereof may be added as a party to the expropriation proceedings, but is not entitled to a separate offer of compensation or a separate award against the company for his portion. **Sanders v. Edmonton, etc., Ry. Co.**, 18 C.R.C. 71, 18 D.L.R. 633.

The form of notice must comply with this section, and not offer compensation in some way not contemplated by the Act: **In re G.T.R. and Ash**, and **In re G.T.R. & Anderson**, 15 C.R.C. 48, 9 D.L.R. 453, affirmed 10 D.L.R. 824.

The notice should offer a sum in cash in compensation for the lands to be taken and damages, and may now include an offer of a conveyance of other lands or an easement or some other privilege as part of the compensation, see sec. 222. The surveyor's certificate, however, must state what sum in cash he thinks is fair compensation.

Where in addition to a sum in money certain crossings and station privileges were offered as compensation for the land and damages, which was accompanied by a surveyors' certificate that the sum offered was a fair compensation therefor; held, no proper notice or certificate, and that a judge's order for taking immediate possession was made without jurisdiction: **Brooke v. Toronto Belt Line Ry. Co.**, 21 O.R. 401, decided under the corresponding section (in the same words as in the Act of 1906), of the Ont. Ry. Act, R.S.O. (1897), cap. 207, sec. 20. See **Fisher v. G.W.R. Co.** (1910) 2 K.B. 252, 26 T.L.R. 435. There was no section in that Act corresponding to sec. 222 of this Act.

By section 222, *infra*, the railway company is empowered to undertake to abandon or grant to the owner or party interested any portion of the company's lands, or the lands being taken, or any easement, servitude or privilege over or in respect of the same, or to construct and maintain any work for the benefit of such owner or person interested, in mitigation of injury or damages caused by the exercise of the company's powers. The section provides that this undertaking may be given by the notice of expropriation or by subsequent notice filed with the arbitrator, and served upon the opposite party. The cases quoted are, therefore, modified to that extent. The compensation offered in the notice of expropriation, **whether all cash, or part cash and an undertaking** under sec. 222 is not necessarily the same as the compensation certified to under sec. 216. Under the former Act the surveyor or engineer certified that the sum offered was, in his opinion, a fair compensation. Under the present section 216 (c) he certifies what sum is, in his opinion, a fair compensation. It is submitted that his certificate should state what the actual compensation in cash should be, irrespective of what other offers the company may make under sec. 222, since, if a warrant for immediate possession becomes necessary under sections 240 and 241, the amount of the security is to some extent governed by the amount stated in the certificate. An undertaking given by the company applying under section 240 might not be accepted by the Court as part of the security, inasmuch as the undertaking is not binding until accepted by the owner or approved by the arbitrator, and confirmed on appeal, if an appeal is taken. (See secs. 222 and 232). If the undertaking never became effective, but had been accepted by the Court in lieu of part of the security under sec. 241, then the amount paid into Court might not be sufficient to cover the compensation and costs of arbitration.

A declaration of readiness to pay rent would not be a sufficient foundation for proceedings under sec. 240, unless the leave of the Board had been obtained; see sec. 199, *supra*.

The notice must be definite and describe the lands intended to be taken or the powers intended to be exercised with regard to and described in the notice, otherwise the notice is invalid. A notice stating that the lands described therein were to be acquired "to the extent required for the corporate purposes of the company" was held to

be invalid in **Lees v. The Toronto & Niagara Power Co.**, 12 O.L.R. 505; 6 C.R.C. 128.

A mortgagor who has conveyed his equity of redemption subject to payment of the mortgage is not entitled to notice of expropriation: **Farr v. Howell**, 31 O.R. 693.

If the railway company take possession of the lands without any formality, the owner is not bound to resort to arbitration proceedings, but may sue to recover possession or for damages for trespass: **Huot v. Quebec, etc., Ry Co.**, Q.R. 10, S.C. 373; **Wilkes v. Gzowski**, 13 U.C.R. 308; **Mason v. South Norfolk Ry. Co.**, 19 O.R. 132; but see notes to section 213; **Saunby v. Water Commissioners** (1906), A.C. 110.

After service of the notice to treat under the English Lands Clauses Act, 1845, corresponding to the notice of arbitration under this sec. 215, a person purchasing an interest in the land becomes a purchaser of an interest in the compensation, see sec. 236, also **Carnochan v. Norwich & Spalding Ry. Co.**, 26 Beav. 169. After service of the notice to treat, the Court of Appeal in England have decided that no onerous interest, either in land taken or in land injuriously affected, can be created by the landowner to the prejudice of the promoters (the railway company); (1903), 1 K.B. 652 (reversing the decision of Lord Alverstone, C.J. (1901), 2 K.B. 753) affirmed by the House of Lords, **Mercer v. The Liverpool, etc., Ry. Co.** (1904) A.C. 461; **City of Edmonton v. Calgary, etc., Ry. Co.**, 22 C.R.C. 182, 30 D.L.R. 222, 53 S.C.R. 406, **In re Myerscough and Lake Erie etc. Ry. Co.**, 15 C.R.C. 168, 11 D.L.R. 458, 4 O.W.N. 1249, and see note to sec. 213 (1). The law had previously been well settled with respect to lands taken, see the cases cited in the judgments, and is now settled as to lands injuriously affected. A notice of arbitration, which includes lands the company are not authorised to take is void, and the company will be restrained from taking any proceedings under it: **G.T. R. v. Lindsay, etc. Ry. Co.**, 3 C.R.C. 174. **Coats v. Caledonian Ry. Co.**, 6 F. (Ct. of Sess.) 1042 and see 5 C.R.C. p. 28.

Notice of desistment in that case should be given under sec. 218 (1), and a fresh notice served, describing accurately the lands the company are authorised to take: **Widder v. Buffalo, etc., Ry. Co.**, 24 U.C.R. 232-3. See also **Wrigley v. Lancashire, etc., Ry. Co.**, 4 Giff. 352. Where the amount of compensation has been referred to

arbitration the notice referred to in sec. 218 (3) should be given. See *re Oliver & Bay of Quinte Ry. Co.*, 6 O.L.R. 543; 3 C.R.C. 384. But where a company has taken possession under a notice it cannot abandon the notice and give a new notice for the same land: *C.P.R. v. Little Seminary of Ste. Thérèse*, 16 S.C.R. 606; *Re Haskill & G. T.R.*, 7 O.L.R. 429, 3 C.R.C. 389.

In *Hendrie v. T.H. & B. Ry. Co.*, 26 O.R. 667; 27 O.R. 46, it was held, following *Corporation of Parkdale v. West*, 12 A.C. 602, that the sections of the Act of 1888 under the headings "Plans and Surveys," and "Lands and Their Valuation," applied to lands injuriously affected, as well as to land taken, by the railway: the corresponding sections here appear under "Location of Line," and "The Taking and Using of Lands."

As to the form of notice required where the lands of another railway company are sought to be acquired, see *G.T.R. v. Lindsay, etc., Ry. Co.*, 3 C.R.C. 174.

Sub-sec. (c) is new and is notice to the opposite party of the provisions of sec. 219.

Where the railway company had treated a person as owner by serving him with notice of expropriation it was held in *Haney v. Winnipeg, etc., Ry. Co.*, 14 C.R.C. 39, 1 D.L.R. 387, that such person has a status without proving title to apply for an injunction restraining expropriation on the ground that the company had agreed upon a price with the plaintiff.

216. Such notice shall be accompanied by the certificate of a sworn surveyor for the province in which the lands are situated or an engineer, who is not interested in the land or in the amount of compensation or damages, which certificate shall state,—

Certificate
of surveyor
or engineer.

- (a) that the land, if the notice relates to the taking of land shown on the said plan, is required for the railway;
- (b) that he knows the land, or the amount of damage likely to arise from the exercise of the powers; and,
- (c) what sum is, in his opinion, a fair compensation for the land and damages aforesaid. R.S., c. 37, s. 194. Am.

Former sec. 194 amended. The principal amend-

ment is in sub-sec. (c). Under the former section the surveyor or engineer certified that the sum offered by the company was, in his opinion, fair compensation. He must now certify what sum is, in his opinion, fair compensation. See the note to sec. 215 as to the effect of this amendment and of sec. 222.

The words "or is within the limit of deviation allowed by this Act," in former sec. 194 (a) have been omitted as no longer required, as suggested in the last edition of this book. It was held in **Widder v. Buffalo & Lake Huron R.W. Co.**, 24 U.C.R. 520, under C.S.C., cap. 66, sec. 11, sub-sec. 7, which is very similar in language to the present section, that: (1) where no land is taken and the company denies the owner's right to compensation, a surveyor's certificate is unnecessary; (2) the notice need not be under the corporate seal of the company; (3) it is not desirable that the company's arbitrator should be one of its own officers. In view of the new method of arbitration by which a judge becomes the sole arbitrator (see sec. 219) the third proposition is unimportant.

Service by
publication.

217. (1) If the opposite party is absent from the district or county in which the lands lie, or is unknown, an application for service by advertisement may be made to a judge of a superior court for the province or district, or to the judge of the county court of the county where the lands lie.

Application
for.

(2) Such application shall be accompanied by such certificate as aforesaid, and by an affidavit of some officer of the company, that the opposite party is so absent, or that, after diligent inquiry, the person on whom the notice ought to be served cannot be ascertained.

Judge shall
order notice.

(3) The judge shall order a notice as aforesaid, but without such certificate, to be inserted three times in the course of one month in a newspaper published in the district or county, or, if there is no newspaper published therein, then in a newspaper published in some adjacent district or county, and in such other newspaper, if any, as the judge may direct. R.S., c. 37, s. 195. Am.

Formerly sec. 195. The last line has been added by way of amendment.

The language of this section is imperative. Its conditions must be complied with before notice can be served by publication.

218. (1) Where the notice given improperly describes the lands or materials intended to be taken, or where the company decides not to take the lands or materials mentioned in the notice, it may abandon the notice and all proceedings thereunder, but shall be liable to the person notified for all damages suffered and costs incurred by him in consequence of such notice and abandonment, and such damages shall be fixed and such costs taxed by the judge, or as he directs.

Notice may
be aban-
doned.

Damages
and costs.

(2) The company after payment of such damages and costs, if any, may, notwithstanding the abandonment of any former notice, give to the same or any other person notice for other lands or materials, or for lands or materials otherwise described.

New notice
may be
given.

(3) Where the amount of compensation payable under the notice has been referred to arbitration, the Company may, in lieu of abandoning the notice pursuant to subsection one hereof, give to the opposite party and to the arbitrator, a notice varying the description of the lands or materials to be taken or the powers intended to be exercised by the Company; which subsequent notice shall also contain,—

Notice in lieu
of abandon-
ment.

(a) a declaration of readiness to pay a certain sum or rent as the case may be, as compensation for such lands or for damages for such materials or powers, and damages suffered and costs incurred by such opposite party in consequence of the former notice;

Particulars
of notice.

(b) a notification that if within eight days after the service of such notice, the party to whom the notice is addressed does not give notice to the Company that he accepts the sum offered by the Company, the arbitrator may proceed to fix the compensation for the lands, materials or powers described in such subsequent notice.

(4) In the event of the arbitration proceeding pursuant to such subsequent notice, all evidence taken and proceedings had under the former notice, shall, in so far as they are applicable, be used in the arbitration upon the

Evidence.

subsequent notice and the proceedings on both notices shall be deemed one arbitration, but the Company shall be liable to pay all damages suffered and costs incurred by the opposite party by reason of the Company having failed to demand by the original notice, the lands, materials or powers as described in the subsequent notice. R.S., c. 37, s. 207. Am.

Former sec. 207 amended. The important amendments are the provision in sub-sec. 1, that the damages suffered and costs incurred by the person notified are to be taxed by the judge or as he directs; the provision in sub-sec. (2) that the company must pay these damages and costs before serving a new notice, and the provisions of sub-secs. (3) and (4).

The word "abandon" used in this section corresponds to the word "desist" used in C.S.C., 1859, cap. 66, sec. 11, sub-sec. 6 and means to leave off or discontinue.

Re Oliver & Bay of Quinte Ry. Co., 3 C.R.C. 384, 6 O. L.R. 543, citing **Widder v. Buffalo, etc., Ry. Co.**, *infra*.

The question was raised in **Re Miller v. Great Western Ry. Co.**, 13 U.C.R. 582, whether after an award has been made, the company can relinquish the land valued and claim exemption from compliance with it; it was held in **Mitchell v. Great Western Ry. Co.**, 35 U.C.R. 148, that they could not, after the award was made, withdraw from the purchase.

In **Grimshawe v. G.T.R.**, 15 U.C.R. 224; 19 U.C.R. 493, it was held under the provision of the Act then in force, 14 & 15 Vict., cap. 51, sec. 11, that a notice for lands might be desisted from and a new notice given, even after the arbitrators had met and were engaged in the arbitration, and the award subsequently made was held void. The same conclusion was reached in **Cawthra v. Hamilton and Lake Erie Ry. Co.**, 35 U.C.R. 581, where two arbitrators had agreed on the amount of the award and had given notice to the other to meet to sign the award when notice of desistment and a new notice were given. It was held in the Supreme Court, **C.P.R. v. Little Seminary St. Thérèse**, 16 S.C.R. 606 (per Patterson and Gwynne, J.J.) that an abandonment of notice to take lands must take place while the notice is still a notice and before the intention has been exercised by taking the lands: followed in **Re Haskill et al. and G.T.R.**, 3 C.R.C. 389, approved by Duff, J., in **Gibb v. The King**, 52 S.C.R. at p. 435.

A railway company was held not compellable to take lands enclosed by an engineer without knowledge of the directors where no notice had been given of intention to take: **Baby v. Great Western Ry. Co.**, 13 U.C.R. 291.

The power to desist extends to lands injuriously affected as well as lands taken. With the notice of desistment a new notice should be given; without it the former notice remains in force to uphold an award duly made under it; this was so decided in case of lands taken or injuriously affected under C.S.C. cap. 66, sec. 11 (7); **Widder v. Buffalo, etc., Ry. Co.**, (1865) 24 U.C.R. 222.

Under R.S.O. (1887), cap. 165, sec. 20, a railway company having desisted once from their notice, could not again desist pending arbitration proceedings under a second notice. The company's arbitrator having withdrawn from such arbitration in deference to a notice of desistment given by the company after the amount to be awarded had been agreed upon by the other two, it was held that the company could not object to the award on the ground that he had not been asked to sign it: **Moore v. Central Ontario Ry. Co.**, 2 O.R. 647. The present statute, R.S.O. (1914) cap. 185, sec. 13, is the same except the concluding provision that the right of desistment shall not be exercised more than once.

See also **Re Hooper and Erie & Lake Huron Ry. Co.**, 12 P.R. 408, where under peculiar circumstances, a third notice of desistment was upheld.

In **Nihan v. St. Catharines, etc., Ry. Co.**, 16 O.R. 459, it was held that notice of desistment served after an Act had been passed bringing the company under the Legislative authority of the Dominion, it having been previously incorporated under the Ontario Act, was effective to avoid the bond given as security upon taking possession and that fresh security must be given by payment of money into the bank under the Dominion Act. Where the company served notice of desistment from original notice and gave no new notice to the land owner, but nevertheless entered upon the land, held that they were in the position of trespassers. **Wilkes v. Gzowski**, 13 U.C.R. 308.

See **Atwood v. Kettle Valley Ry. Co.**, 15 B.C.R. 330.

The amendment by substituting the words "damages suffered and costs incurred" for the words "damages or costs incurred" in the former section, may have been passed by reason of the decision in **Gravel v. G.T.R.**, Q.

R. 38 S.C. 347, 11 C.R.C. 437, holding that those words were to be read "damages and costs," and that "damages" were not confined to land, but included any suffered by the owner, such as fees paid to an advocate and architect while arranging for the arbitration beyond taxed costs.

Under sub-secs. 3 and 4 power companies having the right to expropriate easements may, where this Act applies, abandon certain rights of easement over the lands of owners which they do not wish to exercise with regard to stringing wires over such lands.

Arbitrator.

If sum
offered not
accepted.

Appointment
of arbitrator.

219. (1) If within ten days after the service of such notice, or, where service is made by advertisement, within one month after the first publication thereof, the opposite party does not give notice to the company that he accepts the sum offered by it, either party may apply to the judge of the county court of the county in which the lands lie, or, in the province of Quebec or in any other part of Canada where there is no county court, to a judge of the superior court for the district or place in which the lands lie, to determine the compensation to be paid as aforesaid.

Notice.

(2) Ten days' notice of such application shall be given by the company to the opposite party, or **vice versa**.

Service by
publication.

(3) If the opposite party is absent from the district or county in which the lands lie, or is unknown, service of such ten days' notice may be made by advertisement as in section two hundred and seventeen authorised: Provided that the judge may dispense with, shorten or lengthen the time or times for the publication of the notice in any case in which he deems it proper. R.S., c. 37, s. 196; 1907, c. 37, s. 1. Am.

Substituted for former section 196.

A new method of arbitration is provided. Under the former section, a judge, on the application of either party, appointed a sole arbitrator, or on the request of either party appointed three arbitrators, one of whom might be named by each party. Now the judge of the county court of the county in which the lands lie, or, in the province of Quebec or in any other part of Canada where there is no county court, a judge of the superior court for the district

or place in which the lands lie, himself becomes the arbitrator (sec. 220). For the meaning of "county court" and "superior court" see sec. 2 (7) and R.S.C., cap. 1, sec. 34 (4) and (26).

Presumably any person having an interest which is the subject of compensation may apply: *cf. Re C.P.R. and Batter*, 1 C.R.C. 457, 13 Man. L.R. 200, and *Re T. H. & B. Ry. Co. & Burke et al.*, 27 O.R. 690.

The application is made on notice: sub-secs. (2) and (3). *Quaere*, whether the judge becomes a legally appointed arbitrator if the application is made without notice; see *McGibbon v. North Simcoe Ry. Co.*, 26 Grant 226. Probably the person not notified would be bound by the award, provided the judge had territorial jurisdiction and was not personally interested in the land or in the amount of the compensation or damages, and did not in some other way come within the language of sec. 220. The owner may accept the company's offer at any time after the expiration of ten days if the company has taken no further proceedings in the meantime. Such offer and its acceptance constitute a binding contract between the parties upon which the owner may recover in an action the amount so offered: *Bennetto v. C.P.R.*, 18 Man. L.R. 13, 8 C.R.C. 223.

But a contract to purchase is not established as against a railway company entitled to expropriate lands, by the fact of the company having taken possession after notice from the owner naming his price and stating that if the company took possession he would construe their action as an acceptance of his terms: *Haney v. Winnipeg, etc., Ry. Co.*, 14 C.R.C. 39; 1 D.L.R. 387.

Where a land-owner permits his land to be taken for the construction of a railway, and reserves his right of action for possible damages to his land outside of the right of way, he is not estopped therefrom by a stipulation in the deed of the right of way to the effect that the price of the land conveyed shall include all damages caused by the running of the railway over the land sold. *Desmeules v. Quebec, etc., Ry. Co.*, 15 C.R.C. 94.

220. (1) Such judge shall, upon application being made to him as aforesaid, become the arbitrator for determining such compensation: Provided that where such judge is personally interested in the land or in the amount of the compensation or damages in question, or where for any other reason it is necessary, either party

Constituting
arbitrator.

may, on six days' notice to the opposite party, apply to a judge of a superior court to appoint, and that judge may appoint, a county or superior court judge to be arbitrator, and in such case the judge so appointed shall be the arbitrator for the purposes aforesaid.

Procedure.

(2) The arbitrator shall proceed to ascertain such compensation in such way as he deems best, and, except as hereinafter provided, his award shall be final and conclusive. R.S., c. 37, s. 197. Am.

Award.

Sub-sec (1) is new. Sub-sec (2) is taken from subsecs. (1) and (2) of former sec. 197.

There is no provision requiring the giving of notice to the parties, nor is the arbitrator required to set a time within which the award is to be made. All the procedure not left to the arbitrator will be found in secs. 220 (2) and 224 to 229.

There are no reported decisions on the meaning of the words "or where for any other reason it is necessary." They no doubt provide for cases where the judge dies, or is incapacitated by illness, absence or otherwise, or refuses, for good cause, to act. This view was taken and a judge from another county was appointed, in a case where the judge designated by sec. 219 declined to act on the ground that having previously agreed to act as arbitrator for one of the parties under the old Act it would not be seemly for him to act as sole arbitrator in the same case under the present Act.

"Except as hereinafter provided, his award shall be final and conclusive," refers to the provisions of sec. 232, giving a right of appeal.

Determining Compensation.

Increased value of remaining lands to be considered.

221. (1) The arbitrator, in deciding on such value or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands.

(2) The date of the deposit of the plan, profile and book of reference with the registrar of deeds shall be the date with reference to which such compensation or damages shall be ascertained: Provided, however, that if the company does not actually acquire title to the lands within one year from the date of such deposit then the date of such acquisition shall be the date with reference to which such compensation or damage shall be ascertained.

Date of
compensa-
tion fixed.

(3) The arbitrator may include in the award an allowance for interest on the compensation or damages from the date of deposit of the plan, profile and book of reference with the registrar of deeds or for such shorter time as he deems proper. R.S., c. 37, ss. 198, 192 (2); 1909, c. 32, s. 3. Am.

Interest
may be
allowed.

Formerly secs 192 (2), 198 and 8-9 Edw. VII., cap. 32, sec. 3. The former section 198, which is now subsection 1, above, was held by a divided Court to apply only where lands of the claimant are taken: **Re Vancouver, etc., Ry. Co.**, 14 C.R.C. 101.

The Railway Act renders the doing of certain acts lawful, which would otherwise be unlawful; which would, but for the Act, have resulted in a right of action or proceedings by indictment. Unless therefore "the particular injury would have been actionable before the Company had acquired their statutory powers, it is not an injury for which compensation can be claimed." **Penny v. S.E. Ry. Co.**, 7 El. & Bl. 660. The right to compensation for lands taken or injuriously affected is purely statutory. It depends entirely upon the provisions of the Act of Parliament relating to the subject: **Hammersmith, etc., Ry. Co. v. Brand**, L.R. 4, H.L. 171, at p. 202. Although it was said in **Commissioner of Public Works v. Logan** (1903) A.C. 355, following **Western Counties Ry. Co. v. Windsor, etc., Ry. Co.**, 7 A.C. 178; **re McDowell & Palmerston**, 22 O.R. 563, that unless it clearly appears that a legislature intended to take away property without paying or requiring the payment of compensation, such an intention will not be inferred, yet in the absence of express provision in the statute which authorises the expropriation, or some other statute applicable to the case, there is no right to compensation. It does not follow that a party would have a right to compensation in every case, in which, if the Act of Parliament had not been passed, there might have been not only an indictment but

a right of action: **Caledonian Ry. Co. v. Ogilvy**, 2 Macq. Sc. App. 235. It was suggested in the **Hammersmith Case** at p. 199, that the onus of showing that the legislature has given the right to compensation lies upon the claimant.

The following are submitted as the rules as to what is a subject of compensation:

A. Where lands of claimant are taken:

1. When a railway intersects or cuts a parcel of land, compensation is allowed in the first place, for the land actually taken, and a further sum is allowed as damages for the injury done to the lands not taken, by reason of compulsory severance. **In re Myerscough and Lake Erie, etc., Ry. Co.**, 15 C.R.C. 168, 11 D.L.R. 458, 4 O.W.N. 1249.

2. And such compensation may include damages for injury to the land anticipated from the use and operation of the railway as well as its construction. **Re Birely and Toronto, etc., Ry. Co.**, 28 O.R. 468. Consequently compensation with regard to smoke, noise and vibration should be allowed as affecting that part of the land which lies in reasonable proximity to the railway by reason of trains passing over the strip taken: **Buccleuch v. Metropolitan**, L.R., 5 H.L. 418; **Essex v. Local Board of Acton**, 14 A.C. 153; **Wood v. Atlantic, etc., Ry. Co.**, Q.R. 2 Q.B. 335; (1895), A.C. 257; **In re Billings & C.N.R.**, 16 C.R.C. 375.

3. Such compensation should be confined to smoke, noise and vibration generated on the part taken: **C.P.R. v. Gordon**, 8 C.R.C. 53; **C.N.R. v. C.M. Billings**, 21 C.R. C. 310, 32 D.L.R. 35; **Burt v. Dominion Steel & Iron Co.**, 19 C.R.C. 187, 20 C.R.C. 134.

4. But damages for injurious affection will only be awarded in respect of lands actually cut by the right of way. So where an owner has sub-divided his property into building lots and sold some of the lots before expropriation on such terms that the lands taken and the lands in respect of which the claim is made are shown to be in fact separate and disjoined parcels, no compensation is payable in respect of the lots not cut by the right of way: **C.N.R. v. Holditch**, 20 D.L.R. 557; 50 S.C.R. 265, 19 C.R. C. 112, affirmed 27 D.L.R. 14, (1916) 1 A.C. 536, 20 C.R. C. 101, followed in **re C.N.P. Ry. Co. and Byng-Hall**, 21 C.R.C. 324; 35 D.L.R. 773; 23 B.C. 38; and see annotation in 20 C.R.C. at p. 109.

5. Whether lands have been taken or not the company must pay to the owner compensation for all injuries which the rest of the lands suffer through the construction of its works as distinguished from their subsequent operation or as it is frequently put they must pay damages for all lands injuriously affected by their construction: **Hammersmith, etc., Ry. Co. v. Brand**, L.R. 4 H.L. 171; **Ricket v. Metropolitan Ry. Co.**, L.R. 2 H.L. 175; **Reg. v. Cambrian Ry.**, L.R. 6 Q.B. 422; **Atty.-Gen. v. Met. Ry. Co.** (1894), 1 Q.B. 384; **Holditch v C.N.O. Ry. Co.** (1916), 1 A.C. 536; **Parkdale v. West**, 12 A.C. 602; **Pion v. North Shore Ry. Co.**, 9 L.N. 218, 12 Q.L.R. 205, 14 S.C.R. 677; 14 A.C. 612.

6. The obstruction of natural, proximate and direct approaches to the land by the construction of a railway across existing streets entitles the owner to compensation for depreciation of the value of land when part of the owner's lands has been taken: **Holmested v. City of Moose Jaw and C.N.R.**, 22 C.R.C. 177, 36 D.L.R. 747.

B. Where no lands of claimant are taken:

1. Compensation must be made for all damages arising out of the construction of the railway whether any lands of the claimant are taken or not. **Parkdale v. West**, 12 A.C. 602; **Pion v. North Shore Ry. Co.**, 9 L.N. 218, 12 Q.L.R. 205; 14 S.C.R. 677; 14 A.C. 612; **Bowen v. Canada Southern Ry. Co.**, 14 Ont. App. Rep. 1.

2. Compensation is not given for damages by reason of the use and operation of the railway as distinguished from its construction. The right to compensation depends upon whether the injury is to the land, irrespective of any particular use to which it may be put by the owner, or is only an inconvenience to the owner, not affecting the land. To entitle the claimant to compensation the injury must be an actual injury to the land itself: **Hammersmith, etc., Ry. Co. v. Brand**, L.R., 4 H.L. 171; **Ricket v. Met. Ry. Co.**, L.R. 2, H.L. 175; **Reg. v. Cambrian Ry.**, L.R. 6 Q.B. 422; **Hopkins v. G.N. Ry. Co.**, 2 Q.B.D. 224; **Atty.-Gen. v. Met. Ry. Co.** (1894) 1 Q.B. 384; **Caledonian Ry. Co. v. Walker's Trustees**, 7 App. Cas. 259, 276; **Eagle v. The Charing Cross Ry. Co.**, L.R. 2, C.P. 638; **In re Day & G.T.R.**, 5 C.P. 420; **In re Widder & Buffalo, etc., Ry. Co.**, 20 U.C. Q.B. 638, 23 U.C.Q.B. 208; **Widder v. Buffalo etc., Ry. Co.**, 25 Ont. App. Rep. 209; **Holditch v. C.N.O. Ry. Co.** (1916) A.C. 536; **C.P.R. v. Albin**, 59 S.C.R. 151, 24 C.R.C. 424

3. Inconvenience caused by noise, smoke and greater difficulty of access is not the subject of compensation where no part of the complainant's lands is taken: **Ont. & Que. Ry. Co. v. Vallières**, Q.R. 36, S.C. 349, 11 C.R.C. 1. **In re Birely and T.H. & B. Ry. Co.**, 28 O.R. 468, 25 A.R. 88 must be taken to be overruled on this point by **Powell v. T.H. & B. Ry. Co.**, 25 Ont. App. Rep. 209. See **C.P.R. v. Albin**, 59 S.C.R. 151 at p. 167.

4. Interference with direct and immediate access between the street and the premises affected is the subject of compensation, but not personal inconvenience to the claimant which is not an injury to the land: **Caledonian Ry. Co. v. Walker's Trustees**, 7 App. Cas. 259; **Met. Bd. of Works v. McCarthy**, L.R. 7 H.L. 243; **Eagle v. The Charing Cross Ry. Co.**, *supra*; **Bowen v. Canada Southern Ry. Co.**, 14 Ont. App. Rep. 1; **Powell v. T.H. & B. Ry. Co.**, *supra*.

5. What amounts to sufficient obstruction to entitle the landowner to compensation is a question of fact in each case: **Caledonian Co. v. Ogilvy**, 2 Macq. Sc. App. 235. The test as to whether damages arise out of construction or operation is: Would the works as they now stand, if left unused, form an obstruction to the access to the plaintiff's premises? If not, then the injury arises from operation, and is not a subject of compensation: **Powell v. T.H. & B. Ry. Co.**, *supra*.

Four propositions were enunciated by Lord Selbourne, L.C., in **Caledonian Ry. Co. v. Walker's Trustees**, 7 App. Cas. 259, 276, 295, at p. 276, which have been established by the English cases. And these propositions hold good under the Canadian Railway Act; **Bowen v. Canada Southern Ry. Co.**, 14 Ont. App. Rep. 1; **Reg. v. Buffalo & Lake Huron Ry. Co.**, 23 U.C.Q.B. 208; **Powell v. T.H. & B. Ry. Co.**, 25 App. R. 209; **Holditch v. C.N.O. Ry. Co.** (1916), 1 A.C. 536, 544; **C.P.R. v. Albin**, 59 S.C.R. 151.

1. When a right of action which would have existed if the work in respect of which compensation is claimed had not been authorised by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts.

2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. See **Day v. G.T.R.**; **Powell v. T.H. & B. Ry. Co.**, *supra*.

3. Loss of trade or custom by reason of a work not otherwise directly affecting the house or land in or upon

which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. See **Ricket v. Met. Ry. Co.**, L.R. 2 H.L. 175: "Such damage did not accrue to the plaintiff in his capacity of owner of an estate in land—the trading carried on in the house is entirely distinct from the estate in the house." See **St. Catharines, etc., v. Norris**, 17 O.R. 667; **C.P.R. v. Albin**, 59 S.C.R. 151.

4. The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or private way, is a proper subject for compensation. See **Caledonian Ry. Co. v. Walker's Trustees**, 7 App. Cas. 259 at p. 303 and **Met. Bd. of Works v. McCarthy**, L.R. 7 H.L. 243.

"When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its obstruction then I conceive that the owner has, in respect of any works causing such obstruction, a right of action if these works are unauthorised by Act of Parliament, and a title to compensation under the Railway Acts, if they are constructed under statutory powers."

Method of Assessing Compensation.

The measure of damage to which the claimant is entitled is the value of the land taken and the depreciation occasioned to the remainder by the construction and user of the railway upon the part taken: **In re Davies and James Bay Ry. Co.**, 10 C.R.C. 225, 242. The value of the land taken must, of course, be paid for, the rule being to ascertain the value of the land of which the part so expropriated is a portion before the taking, and the value of the land after the taking, and deduct one from the other, the difference being the amount to be allowed for compensation. **James v. Ontario, etc., Ry. Co.**, 12 O.R. 624; 15 A.R. 1, following **re Ontario, etc., Ry. Co.**, and **Taylor**, 6 O.R. 338; **In re Davies & Jas. Bay Ry. Co.**, 20 O.L.R. 534; 10 C.R.C. 225 at p. 243; **In re Ketcheson & C.N.O. Ry. Co.**, 16 C.R.C. 286 at p. 288.

"The value of the land is to be assessed on the principle of compensation to the owner. The question is not what the persons who take the land will gain by taking it

but what the person from whom it is taken will lose by having it taken from him." Per Lush, J., **Stebbing v. Metropolitan Board of Works**, L.R. 6, Q.B. 37, at p. 45; **Cedar Rapids, etc., Co. v. Lacoste** (1914), A.C. 569 at p. 576."

Where the value of the lands can be closely determined, a practice has been asserted of allowing a sum equivalent to ten per centum of the value to be added thereto for the compulsory taking: **Symonds v. the King**, 8 Can. Ex. C.R. 319; **In re National Trust Co. & C.P.R.**, 16 C.R.C. 291 at p. 296. But there is no express authority for adding ten per centum. It is said to be the practice in England, though it does not seem to be accepted as settled law, *ibid*, p. 302, **Jervis v. Newcastle & Gateshead Water Co.** (1896) 13 T.L.R. 14; **In re Muir and L. E. & N. Ry. Co.**, 19 C.R.C. 107, 110; and see judgment of Idington, J., in **C.P.R. v. Albin**, *supra*.

Evidence of sales of similar land in the neighborhood is admissible in arriving at the compensation to be awarded: **In re National Trust Co. v. C.P.R.**, 16 C.R.C. 291. Where no land is taken or there has been no structural injury to the complainant's land, mere loss of trade or profits by reason of temporary obstruction of access is not the subject of compensation: **Ricket v. Met. Ry. Co.**, L.R. 2 H.L. 175; Rule 3 in **Caledonian Ry. Co. v. Walker's Trustees**, 7 App. Cas. 259. But anticipated loss of profits may be taken into consideration if the land has been rendered a less marketable parcel: **C.P.R. v. Albin**, 59 S.C.R. 151, or where access has been so obstructed as to affect trade carried on on the parcel in question: **Caledonian Ry. Co. v. Walker's Trustees**, 7 App. Cas. 259, 303, and **Met. Bd. of Works v. McCarthy**, L.R. 7 H.L. 243. But this obstruction must be peculiar to that parcel and not common to others: **Iveson v. Moore**, 1 Salk. 15; **Caledonian Ry. Co. v. Ogilvy**, 2 Macq. Sc. App. 235. In **C.P.R. v. Albin**, 59 S.C.R. 151, damages were awarded on the basis of the extent to which the loss of business affected the value of the land "as a marketable article," and arose out of interference with access resulting in actual physical deterioration of the land. And see **St. Catharines v. Norris**, 17 O.R. 667. Where land of the claimant is taken, however, evidence of anticipated loss of profits may be given to prove the damages resulting from severance: **Ripley v. G.N. Ry. Co.**, L.R., 10 Ch. 435; **Bailey v. Isle of Thanet Light Rys. Co.**, (1900), 1 Q.B. 722; **Dodge v. The King**, 38 S.C.R. 149; **Lake Erie, etc., Ry. Co. v. Schooley**, 30 D.L.R. 289; 53 S.C.R. 416; **Pastoral, etc., v.**

The Minister (1914), A.C. 1083. **In re Davies & James Bay Ry. Co.**, 16 C.R.C. 78, 97; 19 C.R.C. 86; **re Cavanagh & Can. Atl. Ry. Co.**, 6 C.R.C. 395; **re J. D. Shier Lumber Cos. Assessment**, 14 O.L.R. 210; **C.P.R. v. Brown**, 9 C.R. C. 56; 18 O.L.R. 85; 42 S.C.R. 600; **Ford v. M. & M.D. Ry. Co.** (1886), 17 Q.B.D. 12; **In re Billings & C.N.O. Ry. Co.**, 16 C.R.C. 375; 21 C.R.C. 310, 19 C.R.C. 193; and see in **re Mayor, etc. of Tynemouth & Duke of Northumberland** (1903), 19 T.L.R. 630; **Paint v. Queen** (1890), 2 Ex. C.R. 149; **Marson v. G.T.P.** (1912), 1 D.L.R. 850, 14 C.R.C. 26; **In re Gough & Aspatia, etc. Water Board** (1903), 1 K.B. 574. Future possibilities of development or special adaptability, or a special value to the owner may be elements to consider in awarding compensation. An owner is entitled to compensation based on reasonable probabilities of what may happen in the future: **re Gibson and Toronto**, 11 D.L.R. 529, 28 O.L.R. 20; **In re Davies & Jas. Bay Ry. Co.**, 16 C.R.C. 78; **L.E. & N. Ry. v. Schooley**, 21 C.R.C. 334.

Two rules as to future development have been laid down in **Cedar Rapids Co. v. Lacoste** (1914) A.C. 569 at p. 576, followed in **C.N.R. v. C. M. Billings**, 19 C.R.C. 193; **Rex. v. Trudel**; 19 D.L.R. 270; 49 S.C.R. 501, and **Green v. C.N.R.**, 19 C.R.C. 139, 171; 22 D.L.R. 15:—

(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker.

(2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Special Adaptability.

Special adaptability of a property for the purposes of the business of the owner is an element of compensation: **Pastoral Finance Assn. v. The Minister** (1914) A.C. 1083; **The Queen v. Burrow**; **Met. Ry. Co. v. Burrow** (1884), London Times 24th Jan. & 22nd Nov. 1884; **Re Brantford Golf, etc., Club and L.E. & N. Ry. Co.** (1914), 32 D.L.R. 219; 32 O.L.R. 141.

But the owner cannot have savings and profits capitalized: **L.E. & N. Ry. Co. v. Schooley**, 25 D.L.R. 537; 30 D.L.R. 289; 34 O.L.R. 328; 53 S.C.R. 416; 21 C.R.C. 334. See note, 21 C.R.C. 349.

Special Value to Owner for Particular Purpose:

Whatever use land expropriated could be put to, or was available for, and not only that which was customarily used in connection with the homestead, should be paid for: **In re Billings & C.N.O. Ry. Co.**, 16 C.R.C. 375, 15 D.L.R. 918, 29 O.L.R. 608, following **Ford v. Metropolitan & Met. District Ry. Co.**, 17 Q.B.D. 12, as for instance, subdivision: **In re Muir & L.E. & N. Ry. Co.**, 19 C.R.C. 107, 20 D.L.R. 687, reversed 21 C.R.C. 350, 32 D.L.R. 252.

But this special value or adaptability to be the subject of compensation, must exist for the landowner, not for the purchaser. But where the special value exists not only for the expropriating purchaser, but also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes: **In re Lucas and Chesterfield Gas & Water Board** (1909) 1 K.B. 16 at p. 31, approved in **Cedar Rapids, etc., Co. v. Lacoste** (1914) A.C. 576, and this rule applies, although the possible purchaser would be obliged first to obtain statutory powers. But the extent and imminence of competition amongst possible purchasers must have an important bearing on the weight to be given to it as affecting the quantum of compensation: **Lucas Case**, p. 32. Where evidence is given of special adaptability on the ground of the probability of purchasers requiring the land for particular purposes for which it is suited, the arbitrator is to value the possibility of such purchase and not the value to the purchaser who shall have realized the probability: **Lucas Case**, p. 28; and see **Stebbing v. Met. Bd. of Works**, L.R. 6 Q.B. 37, at p. 45.

Interest.

Formerly arbitrators had no power to deal with interest. **C.N.R. v. Robinson**, 8 C.R.C. 226, 17 Man. L.R. 396. **In re Clarke and Toronto, G. & B. Ry. Co.**, 9 C.R.C. 290, 18 O.L.R. 628. **In re Davies & James Bay Ry. Co.**, 10 C.R.C. 225, 20 O.L.R. 534. **In re Ketcheson and C.N.O. Ry. Co.**, 16 C.R.C. 286, 13 D.L.R. 854, 29 O.L.R. 339. The right to interest is statutory and the rule prior to the passing of the present section was that when land was taken interest ran from the time at which the company took or became entitled to take, possession: per Moss, C.J.O., **In re Davies and James Bay Ry. Co.**, *supra*. The rule was

different when no land was taken, *ibid*, citing *In re Leak and City of Toronto*, 26 A.R. 351, 30 S.C.R. 321. Now in either case the right to interest and the date from which it is to be allowed are to be determined by the arbitrator.

222. In mitigation of any injury or damage caused or likely to be caused to any lands by the exercise of the company's powers, the company may, by its notice of expropriation or by subsequent notice filed with the arbitrator, and served upon the opposite party, prior to the close of the hearing before the arbitrator, undertake to abandon or grant to the owner of the above mentioned lands or the party interested therein any portion of the company's lands, or the lands being taken, or any easement, servitude or privilege over or in respect of the same, or to construct and maintain any work for the benefit of such owner or person interested, and if such owner or person interested, by writing filed with the arbitrator, consents to accept what is so undertaken, or if the arbitrator approves thereof in the award, such undertaking shall be binding upon the company, and the compensation or damages shall be fixed in view of what is so undertaken, and the undertaking may be enforced by the Board, or damages may be recovered for the breach thereof in any court of competent jurisdiction. **New** (See R.S., c. 143, s. 30.)

Company
may offer
easement,
etc.

This section is new and appears to be based upon sec. 30 of The Expropriation Act (R.S.C., cap. 143). A railway company might heretofore alienate, sell or dispose of any lands or property of the company which for any reason had become not necessary for the purposes of the railway: sec. 162 (1) (c); and see sec. 204 (2), *supra*; but this power was quite separate from the right to expropriate and the company was not enabled to offer as part of the compensation, land not required for the purposes of its railway, nor to force a re-sale to the landowner, nor to offer an easement or servitude over the railway lands: *Quebec, etc., Co. v. Quebec, etc., Ry. Co.* (1908) A.C. 217, 7 C.R.C. 336; *Ont., etc., Ry. Co. v. Philbrick*, 12 S.C.R. 288; *Armstrong v. Jas. Bay, etc., Ry. Co.*, 12 O.L.R. 137, 5 C.R.C. 306, reported on appeal on another point in 38 S.C.R. 511, 6 C.R.C. 196. But where land was taken by a railway company and afterwards found to be unsuitable, the offer of a re-conveyance was

held to be proper for consideration when awarding compensation. **Re Hanna and Campbellford, Lake Ontario & Western Ry. Co.**, 25 D.L.R. 234, 34 O.L.R. 615; 21 C.R. C. 326.

What the effect will be of enabling a company to offer and grant "any easement, servitude or privilege * * * or to construct and maintain any work for the benefit of" the landowner, remains open for decision. The Board would seem to have jurisdiction over the construction and maintenance of any work, and to have power to approve or forbid any physical erection or excavation which would render the operation of trains unsafe for the public using them. No provision seems to have been made, however, for disclosure to the Board of the granting of any easement, and an inspection might possibly not reveal its existence in all cases. It is conceivable that the exercise of the right of enjoyment of such an easement might result in danger to the operation of trains or to the person exercising the right. The granting of an easement not having the sanction of the Board, and the grant having been made in mitigation of damages only, and not as a necessary incident of the construction or operation of the railway, interesting questions of liability might arise.

Title to the land of a railway might always have been gained by adverse possession, even though the land in question was not surplus land, or land not required for the purposes of the railway: **Midland Ry. Co. v. Wright** (1901) 1 Ch. 738. But this section seems to work a radical change in the law as to prescription. A prescriptive right implies a grant, and a railway company having hitherto no power in law to grant an easement, it naturally followed that no right to an easement could be obtained by user. In a number of cases the courts have presumed, as to farm crossings which had apparently existed from the time of construction of the railway, that they had been allowed as part of the original agreement with the owner, even though the deeds to the company did not reserve them; and the removal of such crossings has been enjoined on that ground. But these agreements could be supported on the ground that landowners were entitled by the provisions of the Railway Act to the farm crossings necessary to the enjoyment of their severed lands, and the grant of a crossing was a proper and lawful part of the consideration. In **Leslie v. Père Marquette Ry. Co.**, 24 O.L.R. 206, 13 C.R.C. 219, 228, it was held with respect to an underground crossing, maintained and used under the railway tracks for over 20 years, that the plaintiffs

had established an easement by continuous user as of right for over 20 years. The court appeared to accept the finding of the Board in another application that the crossing was supplied in consequence of an agreement, and considered that a lost grant might be presumed. In any event, the plaintiffs were entitled to a farm crossing. It follows that the finding as to the easement was unnecessary for the decision of the case, and though on appeal it was held that an easement had been established, the decision seems to have rested on the presumption that if the plaintiffs were entitled to a crossing, and a crossing had been constructed, the parties would naturally have an agreement about it. The case therefore seems to be of doubtful authority as to the right being based on prescription rather than the statutory right under the Railway Act. In **C.P.R. v. Guthrie**, 31 S.C.R. 155, 1 C.R.C. 9, it was decided that an easement could not, under the circumstances of that case, be acquired by prescription over the lands of a railway company. Leave to appeal from this decision to the Privy Council was refused. And see **McKenzie v. G.T.R.**; **Dickie v. G.T.R.**; 7 C.R.C. 47, 14 O.L.R. 671; **Kelly v. G.T.R.**, 14 O.W.R. 602. A railway company having now the right to grant an easement (other than an adjoining owner's right of crossing), it may be that such an easement may be acquired by user for the necessary period, but if this is so, it is submitted that no lost grant could be presumed to have been made before 7th July, 1919, upon which date the Royal assent was given to the present Act, containing this new clause. As to the right of appeal where compensation and damages are awarded under the provisions of this section, see notes to sec. 232, *infra*.

The section gives the company no express power to make alternative offers in its formal notice, and it is submitted that the amount offered in cash is to be regarded as the amount it is prepared to pay in addition to whatever offers it may make of lands or works under section 222 and the notice should be framed accordingly. Thus, if a company in its notice of expropriation offers to construct certain works in mitigation of the damages the notice should be regarded as offering both the money and the works and not as offering the money subject to reduction of the amount if the offer of works be accepted by the owner. If it were otherwise, an offer of lands or works by a subsequent notice would be in effect a withdrawal of the original offer, and this, it is submitted, is not contemplated. Compare sec. 218.

The sum offered must be "certain" (sec. 215); the owner must be informed just what amount (together with the lands or works, if any, offered under sec. 222) he is to get. If he then accepts, the matter is settled; if not, it rests with the arbitrator to award the sum offered, or a greater or less sum, with or without the lands or works offered in mitigation of damages, or any of them, and to award costs to one party or the other in his discretion, having regard to the adequacy or inadequacy of the offers made and to all other circumstances of the case.

Costs of Arbitration.

Costs,
how disposed
of.

223. (1) The costs of the arbitration shall be in the discretion of the arbitrator and shall be paid by the party against whom he allows the same, and it shall be the duty of the arbitrator to state in his award whether the whole or any part of the costs are allowed and by whom the same are to be paid.

Taxation.

(2) The amount of the costs, if not agreed upon, may be taxed by the proper taxing officer for the taxation of costs of an action or suit tried before the judge who acted as arbitrator, and appeal may be taken from such taxing officer as in the case of the costs of such an action or suit. R.S., c. 37, s. 199. Am.

No fees.

(3) The arbitrator shall not be entitled to any fee or reward for his services as arbitrator, but shall be paid, as part of the costs of the arbitration, all his actual necessary and reasonable travelling and other expenses incurred in or in connection with the arbitration. **New.**

Expenses.

This section is new and annuls much of the former law. Costs are now in the discretion of the arbitrator. Formerly the right to costs followed the result of the award (former sec. 199); if the sum awarded exceeded the sum offered by the company the costs of the arbitration were borne by the company; but if otherwise, they were borne by the opposite party, and were deducted from the compensation. The arbitrators had no jurisdiction to deal with costs: **In re G.T.R. and Ash and Anderson**, 15 C.R.C. 48. They are now taxed by the proper taxing officer for the taxation of costs of an action or suit tried before the judge who acted as arbitrator, and there is a right of appeal from the taxing officer. Costs were to be taxed by the judge under the former Act, and his

decision was final: **Wood v. Atlantic, etc., Ry. Co.** Q.R. 9 S.C. 297. The procedure now provided is, however, the same as that which in practice often obtained under the old Act, the judge referring the bill for taxation to a taxing officer and then accepting or varying the result: **Re McRae & Ontario, etc., Ry. Co.**, 12 P.R. 282 and 327, **re Oliver and Bay of Quinte Ry. Co.**, 3 C.R.C. 386, 7 O.L.R. 567; **Atwood v. Kettle Valley Ry. Co.**, 15 B.C.R. 330. The arbitrator is not now allowed fees, but is entitled to his actual necessary and reasonable travelling and other expenses; and these are part of the costs of the arbitration. Formerly neither costs nor arbitrator's fees were part of the award: **Gauthier & Dagenais v. C.N.R.**, 19 C.R.C. 144, 17 D.L.R. 193; **Green v. C.N.R.**, 19 C.R.C. 139, 171, 22 D.L.R. 15. The wording of sub-sec. (1) might be held to make costs now a part of the award. There is no express provision for recovering them, and an action may be necessary: **Ontario, etc., Ry. Co. v. Philbrick**, 5 O.R. 674, 12 S.C.R. 288; **Re Foster & Great Western Ry. Co.**, 32 U.C.R. 503; **Atwood v. Kettle Valley Ry. Co.**, *supra*; **Calgary & Edmonton Ry. Co. v. Saskatchewan Land and Homestead Co.**, 46 D.L.R. 357, 24 C.R.C. 346.

The owner is not entitled to a lien on the land for costs of the arbitration: **Ferrars v. Staffordshire, etc., Ry. Co.**, L.R. 13 Eq. 524, unless costs are properly a part of the award, in which case a lien may arise. See sec. 236.

An agreement to pay all costs incidental to the arbitration does not extend to costs as between solicitor and client, nor to costs preliminary to the arbitration. **Bronson v. Canada Atlantic Ry. Co.**, 13 P.R. 440.

The decision in **re Arbitration between Holliday and Corporation of Wakefield**, L.R. 20, Q.B.D. 699, under the Land Clauses Act (1845) sec. 34 (Eng.), that the costs of a special case are incident to and therefore part of the costs of the arbitration depends on the special wording of that Act and probably is of no authority under this Act.

An offer made by either party after the matter of compensation has been referred to arbitration is probably too late to affect the matter of costs: **Fitzhardinge v. Gloucester & Berkeley Canal Co.**, L.R. 7 Q.B. 776; **Gray v. N. E. Ry. Co.**, 1 Q.B.D. 696.

Where a company has taken possession of lands under a notice of expropriation, it cannot abandon the notice and give a new notice for the same land, but where a company gave such a new notice, naming a larger sum, it was

held that the offer of the increased sum might be taken into consideration upon the question of costs: **Re Haskill and G.T.R.**, 7 O.L.R. 429, 3 C.R.C. 389. The matter is however in the discretion of the arbitrator, and if he has exercised his discretion, the Court is unlikely to interfere with his decision.

Definite principles upon which costs will be awarded by arbitrators under this section will no doubt be developed in future cases; no doubt the sufficiency or insufficiency of the company's offer will continue to be an important, though no longer the sole, determinant.

Proceedings of Arbitrator.

Examination
by arbitra-
tor.

Proviso.

224. The arbitrator shall examine on oath or solemn affirmation such witnesses as appear before him, but no more than three expert or opinion witnesses shall be called in behalf of any party: Provided that the arbitrator may by consent of the parties decide the matter upon view or inspection of the property without examining witnesses, but any party or his representative may in such case be permitted to point out and explain such things as seem material to the case. R.S., c. 37, s. 200. Am.

Formerly section 200, but amended to limit the number of expert or opinion witnesses to three (instead of five, as under R.S.O., 1914, c. 145, sec. 7) and to provide for a decision by consent of the parties upon view or inspection without examining witnesses. Apart altogether from the view or inspection provided for in this section, the arbitrator has always had the right to supplement the evidence adduced by a view or inspection of the lands (see sec. 220) (2). But the legal effect of this latter view differed from that of the view provided for in this section. In **London General Omnibus Co. v. Lavell**, 70 L.J., Ch. 17, (1901), 1 Ch. 135, 83 L.T. 453, it is said that "a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." In **re Calgary, etc. & MacKinnon**, 2 Alta., L.R. 438, 11 C.R.C. 27, the Supreme Court of Alberta held that the arbitrators might view the lands being expropriated for the purpose of better understanding the evidence, but could not disregard the evidence and substitute their own opinion founded on the view. On appeal to the Supreme Court of Canada, (43 S.C.R. 379, 11 C.R.C. 32), it was held that in this case it must be presumed that the arbitrators acted

rightly in the absence of any suggestion of irregularity, informality, illegality or partiality. The law propounded by the Supreme Court of Alberta is probably right. But these two cases apply only to a view taken under the general powers of the arbitrator, and, it is apprehended, do not apply to a view taken under sec. 224. Section 225 (a) enables the arbitrator to enter and view even without the consent of the owner. The amendment to this section modifies the effect of the decision in **Quebec etc., Co. v. Quebec Bridge & Ry. Co.**, 16 Que. K.B. 107, (1908) A.C. 217, 7 C.R.C. 336 that the parties to an arbitration could not by agreement take away the right of the arbitrator to examine witnesses. It would appear that in a case where witnesses are examined the view must be under section 225, and that the arbitrator cannot in such cases discard the evidence and "decide the matter upon view or inspection" alone as under section 224, notwithstanding the discretion as to methods given the arbitrator by sec. 220 (2).

- 225.** (1) The arbitrator may in any case with respect to such arbitration,—
- (a) enter upon and inspect any land, place, building, works or other thing, being the property of or under the control of the company or the opposite party, the entry or inspection of which appears to him requisite; Powers of arbitrator.
Entry.
 - (b) inspect any works, structure, rolling stock or property of the company; Inspection.
 - (c) require the production of all books, papers, plans, specifications, drawings and documents relating to the matter before him; and, Production.
 - (d) administer oaths, affirmations or declarations. Oaths.
- (2) He shall have the like power in summoning witnesses and enforcing their attendance and compelling them to give evidence and produce books, papers or things which they are required to produce as is vested in any court in civil cases. Compelling witnesses.
- (3) The persons attending and giving evidence at any such arbitration shall be entitled to the like fees and allowances for so doing as if summoned to attend before the Exchequer Court. Witnesses' fees.

Incriminating papers.

(4) The provisions hereinbefore contained with respect to the production before the Board of books and papers which may tend to criminate the persons producing them shall apply to persons attending and giving evidence at any such arbitration. R.S., c. 37, s. 201. Am.

Formerly sec. 201, amended. Note the inclusion of "land" in sub-sec. (a).

Since sec. 66 applies to "any action or proceeding under this Act," it necessarily applies to arbitrations.

Sub-section (4) applies only to "attending and producing"; see sec. 65, *supra*. As to oral evidence, see R.S.O., cap. 145, sec. 5.

Notes of evidence.

226. (1) The arbitrator shall take down in writing the evidence brought before him; unless either party requires that it be taken by a stenographer; in which case a stenographer shall be named by the arbitrator, unless the parties agree upon one.

Stenographer.

(2) The stenographer shall be sworn before the arbitrator before entering upon his duties.

His expenses.

(3) The expense of such stenographer, if not arranged by agreement between the parties, shall form part of the costs of the arbitration. R.S., c. 37, s. 202. Am.

Formerly sec. 202. Sub-section (3) is amended by substituting the words, "if not arranged by agreement between the parties, shall form part of the costs of the arbitration" for the words "if not determined by agreement between the parties, shall be taxed by the court or a judge thereof, and shall, **in any case**, form part of the costs of the arbitration." The parties apparently may now agree that the expense of a stenographer shall not be included in costs.

Notice of award to be given.

227. (1) After making the award, the arbitrator shall forthwith notify the parties that the award has been made, and shall forthwith deliver or transmit by registered post the award and the depositions, exhibits and all other papers connected with the arbitration to the clerk of the court, to be filed with the records of the said court.

Award, etc., to be filed.

How notice to be given.

(2) The notice of the making of the award may be given by registered letter addressed to the parties at their

usual or last known post office addresses, or addressed in care of their representatives, if any, who appeared for them in the arbitration proceedings. R.S., c. 37, s. 203. Am.

Formerly sec. 203. The provisions for notifying the parties are new; and the arbitrator must forthwith send the award to the clerk of the court without waiting for a request by either party. **Quaere:** Is the arbitrator's lien for expenses affected by sub-sec. 1?

Preventing Delay.

228. After the making of the application constituting him arbitrator, or in the case of appointment by order of a judge of a superior court after the receipt of such order or a copy thereof, the arbitrator shall proceed with and complete the arbitration and award as speedily as possible, having regard to the interests of the parties, and he may give any directions respecting the proceedings which he deems proper to prevent delay. R.S., c. 37, s. 204. Am.

Arbitrator
to proceed
speedily.

Directions
to prevent
delay.

Substituted for former sec. 204. The arbitrator, although required to act expeditiously, is not now required to fix a day on or before which the award shall be made and the provision in former sec. 204, that if the award is not made within the time fixed the amount offered by the company shall be the compensation to be paid has been omitted.

229. (1) If the arbitrator dies before the award is made, or is incapacitated, disqualified or unable to act, either party may, on six days' notice to the opposite party, apply to a judge of the superior court to appoint, and such judge shall appoint, any county or superior court judge to be arbitrator in the place of the arbitrator who has died, become incapacitated, disqualified or unable to act.

Death or
delay of
arbitrator.

Application
to court or
judge.

(2) The proceedings shall not in any such case require to be recommenced or repeated.

Proceedings
not to be
repeated.

(3) The cost of applications and proceedings under this section shall form part of the costs of the arbitration proceedings. R.S., c. 37, s. 206. Am.

Costs.

Former sec. 206, amended. The word "incapacitated" in sub-sec. (1) and all of sub-sec. (3) are new. Cases dealing with the appointment of a new arbitrator under former sec. 206 are no longer law.

Impeaching Award.

Award not
invalidated
by want of
form.

230. (1) No award shall be invalidated by reason of any want of form or other technical objection, if the requirements of this Act have been substantially complied with, and if the award states clearly the sum awarded, and the lands or other property, right or privilege for which sum is to be the compensation.

Payee need
not be
named.

(2) The person to whom the sum is to be paid need not be named in the award. R.S., c. 37, s. 205.

Former sec. 205.

If the award contains an adequate and sufficient description of the land expropriated, the maxim "**falsa demonstratio non nocet**" applies. **Beaudet v. North Shore Ry. Co.**, 15 S.C.R. 44; **Bigaouette v. North Shore Ry. Co.**, 17 S.C.R. 363.

The award must be of a sum certain and fixed; formerly a direction in the award that the railway company construct a culvert was invalid, **Bourgoin v. Montreal, etc., Ry. Co.**, 5 A.C. 381 or that part of the land taken should be given back to the owner and a road constructed thereon for the benefit of the owner. **Quebec Improvement Co. v. Quebec Bridge & Ry. Co.** (1908), A.C. 217, 7 C.R.C. 336. See also **Great Western Ry. Co. v. Hunt**, 12 U.C.R. 124, **Starnes v. Molson**, 29 L.C.J. 278; Sec. 222 modifies the effect of these decisions.

The award can only be impeached or set aside in proceedings by way of appeal under sec. 232; see sec. 232 (3).

Arbitrator
not disquali-
fied by—

Opinion;

Kindred.

231. If the arbitrator is not himself personally interested in the amount of the compensation he shall not be disqualified because he has previously expressed an opinion as to the amount of compensation or because he is related or of kin to any shareholder of the company. R. S., c. 37, s. 208. Am.

Former sec. 208.

The former provisions that an arbitrator shall not be disqualified because he is employed by either party, and

that cause of disqualification must be urged before appointment, are necessarily omitted. If it is desired that the judge ordinarily having jurisdiction as arbitrator should not act, either party, on 6 days' notice to the opposite party, may apply to a judge of a superior court to appoint some other county judge or a superior court judge. See sec. 220. For a discussion of the former law see **Brunet v. St. Lawrence, etc., Ry. Co.**, 3 *Revue de Jurisprudence* 332; *re McQuillan & Guelph Junction Ry. Co.*, 12 P.R. 294; **North Shore Ry. Co. v. Ursuline Ladies of Quebec** (1885) *Cass. Can. S.C.R.*, *Digest*, p. 36.

Appeal From Award.

232. (1) Within one month after receiving from the arbitrator or from the opposite party a written notice of the making of the award, the company may, where the award exceeds six hundred dollars, and any other party may, where such party in his notice of appeal claims more than six hundred dollars or objects to some easement or other thing approved by the arbitrator without his consent under section two hundred and twenty-two, appeal from the award upon any question of law or fact, or upon any other ground of objection, to a superior court, or to the court of last resort of the province in which the lands lie, if a judge of a superior court has been constituted arbitrator: Provided that where the award is less than six hundred dollars the company or the opposite party may, within the time limited by this section, appeal from the award upon any question of law or upon any question of mistake appearing on the face of the proceedings, to a superior court or to the court of last resort as the case may be; and upon the hearing of the appeal such court shall decide any question of fact upon the evidence taken before the arbitrator as in the case of original jurisdiction: Provided that the court may, where, from any other evidence it deems proper to admit, it is clearly satisfied that injustice has been done, set aside the award or remit it to the arbitrator for reconsideration with such directions as it deems proper.

Appeal
from
award.

(2) Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior court to the said superior

Practice and
proceedings
on appeal.

court, subject to any general rules or orders from time to time made by the court to which such appeal lies in respect to such appeals.

No further
appeal, etc.

(3) The decision of such court shall not, except where the amount awarded by or claimed in the appeal from such decision exceeds five thousand dollars, be subject to further appeal, and except as herein provided there shall be no appeal from, or proceedings had to impeach or set aside any award made under this Act. R.S., c. 37, s. 209. Am.

Substituted for former section 209, which read as follows:

"209. Whenever the award exceeds six hundred dollars, any party to the arbitration may, within one month after receiving a written notice from any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior court; and upon the hearing of the appeal such court shall decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

2. Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior court to the said superior court, subject to any general rules or orders from time to time made by the said last mentioned court, in respect to such appeals.

3. Such general rules and orders may, amongst other things, provide that any such appeal may be heard and determined by a single judge.

4. The right of appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards."

An appeal is now provided from the arbitrator to a superior court in every case, and the court may either reform the award, or set it aside or remit it to the arbitrator for reconsideration.

The appeal must be taken within one month after receiving from the arbitrator or from the opposite party a written notice of the making of the award. It is sufficient if notice of appeal is given within the month; it is not necessary that the appeal should be heard within that time: **Re Potter and Central, etc., Ry. Co.**, 16 P.R. 16.

Formerly where the award did not exceed \$600, neither party could appeal from it, but it could be attacked by way of motion to set it aside for misconduct of arbitrators, or on other sufficient grounds. The present Act gives a restricted right of appeal from such an award, but (see s.s. 3) takes away the right to attack it by any other proceedings.

The effect of the section may be summarized as follows:

(a) Either party may appeal from an award exceeding \$600 "upon any question of law or fact or upon any other ground of objection."

(b) An owner has the same right of appeal from an award of \$600 or less, if in his notice of appeal he claims more than \$600 or objects to any item allowed in mitigation under sec. 222.

(c) Either party may appeal from an award, whatever its amount, upon any question of law or upon a question of mistake appearing on the face of the proceedings.

(d) In no other manner and on no other grounds than as in this section provided can an award under this Act be appealed from or impeached or set aside.

It is submitted that the proviso in the last five lines of sub-sec. 1 does not give a substantive right to appeal or attack the award in any case but applies only where a right of appeal has already been given by the previous words of the sub-section.

As to the grounds on which the award of an arbitrator may be interfered with on appeal see the judgment of the Privy Council in **Ruddy v. Toronto Eastern Ry. Co.**, 33 D. L.R. 193; 21 C.R.C. 377; also **Noble v. Campbellford, etc., Ry. Co.**, 21 C.R.C. 380 and note on these cases 21 C.R.C. 383. Awards of arbitrators are placed in a position similar to that of the judgment of a trial judge, subject, of course, to the proviso, which is new, in the last clause of sub-section 1 of this section.

Under the former Act it was held that there was no power to remit an award back to the arbitrator, though the cases on that point were not uniform; see note 21 C. R.C. 413. The power to remit is now given in express terms; and this provision should settle what has so far been a moot point; it will be of great assistance in cases like **In re Nash & Williams and Edmonton, etc. Ry. Co.**, 21 C.R.C. 399; 36 D.L.R. 601, where the arbitrators did not

deal with a claim made by the mine-owners thinking that the claim was not legally the subject of compensation. Consequently there was no evidence on which the Appellate Court could make a finding. The law on this point as interpreted by the Courts before this enactment came into force was as follows:—It was uniformly held in Ontario that there was no right to remit the award to the arbitrators: *re McAlpine and Lake Erie, etc. Ry. Co.* (1902) 3 O.L.R. 230; *re Davies & James Bay Ry. Co.* (1913) 28 O.L.R. 544 at p. 568; *C.N.R. v. Holditch*, 50 S.C.R. 265 at p. 278. In *Cedar Rapids, etc., Co. v. Lacoste* (1914) A.C. 569 at p. 580 it was held by the Privy Council that there was such a right to refer back, but the Supreme Court of Canada cast doubt on that decision on the ground that the report did not show that the question of jurisdiction had been raised before their Lordships. The case was followed, however, in *re Nash & Williams and Edmonton, etc., Ry. Co.*, 21 C.R.C. 399, 36 D.L.R. 601; and see *C.P.R. v. Ball*, 19 C.R.C. 99; 20 D.L.R. 903; *C.N.R., etc. v. Moore*, 53 S.C.R. 519; 21 C.R.C. 112, 31 D.L.R. 456.

The effect of the section as a whole seems to be that the Court may review the whole case, as to both fact and law, upon the evidence taken before the arbitrator, and may thereon affirm or set aside the award or vary it either as to the amount awarded or as to the lands, works or privileges approved by the arbitrator under section 222 or as to the value set on them or otherwise. New evidence can be admitted at the discretion of the Court; but only, it is submitted, for the purpose of setting aside the award or having it remitted for reconsideration.

It would appear that no appeal can be taken by the company against the allowance of items in mitigation of damages under section 222, except in cases where the amount awarded exceeds \$600 in cash, or, perhaps, where the cash awarded and the value of the items allowed in mitigation appear on the face of the award to exceed \$600 when taken together. The arbitrator has no power to allow such items in mitigation unless they have been offered by the company; and the company cannot complain of their being allowed in accordance with its offer; so that in such cases its objection, if any, must be to the amount of money awarded.

On the other hand, an owner awarded less than \$600 can apparently evade the restrictions intended to be placed upon appeals from small awards, by simply claim-

ing a larger sum in the notice of appeal, whereupon all grounds of appeal seem to be open to him.

It is submitted that sub-sec. 3, purporting to prevent a further appeal in cases under \$5,000, does not take away the right of appeal to the Privy Council, which rests upon the Crown's prerogative; compare section 52, *supra*, and notes thereon.

As to the right of appeal to the Supreme Court see Supreme Court Act, R.S.C., cap. 139, secs. 37 to 40, as amended 10-11 Geo. V., c. 32, sec. 2; **James Bay Ry. Co. v. Armstrong** (1909) A.C. 624; 10 C.R.C. 1; **Ottawa Electric Ry. Co. v. Brennan**, 31 S.C.R. 311; **Trustees Grosvenor St. Church v. Toronto** (May, 1918), reported in Cameron's S.C. Practice, 1919, Vol. 2, p. 148.

As to the proper provincial Court to hear the appeal see note: "Jurisdiction in Appeals from Awards," 21 C.R.C. 381. It is submitted that in Ontario, under the present practice, the appeal must be taken to the Appellate Division of the Supreme Court of Ontario, whether it be from a County Court or a Supreme Court Judge. In all provinces, the appeal lies to a superior court, but if a judge of a superior court has been constituted arbitrator, the appeal must be to the court of last resort of the Province in which the lands lie. "Superior Court" is to be interpreted according to the Interpretation Act and amendments thereto, see sec. 2 (7) (b), *supra*, and R.S.C., cap. 1, sec. 34 (26). Except where a judge of a superior court has acted as arbitrator there is an appeal from the award to the Superior Court, or to any one (if there be more than one) of the Superior Courts of the Province in which the lands in question lie; but there is no further appeal from one superior court to another: **Ontario—Birely v. Toronto, etc., Ry. Co.**, 25 A.R. 88; **Ottawa Electric Co. v. Brennan**, 31 S.C.R. 311; **Armstrong v. James Bay Ry. Co.** (1909) A.C. 624, 10 C.R.C. 1; **C. F. Russell and Toronto, etc., Ry. Co.**, 46 O.L.R. 394. **Quebec—Vallières v. Ontario, etc., Ry. Co.**, Q.R. 36, S.C. 349, 11 C.R.C. 1, 18, 11 Q.P.R. 245; **Rolland v. G.T.R.**, 14 C.R.C. 21, 7 D.L.R. 441; **C.P.R. v. The Little Seminary of Ste. Thérèse**, 16 S.C.R. 606; **New Brunswick—St. John, etc., Ry. Co. v. Bull**, 16 C.R.C. 284.

It is not a proper practice to initiate new proceedings in the superior court by issuing a writ and attaching to it a petition containing reasons of appeal. **Ross Realty Co. v. Lachine, etc., Ry. Co., and Bastien**, 15 C.R.C. 172; 11 D.L.R. 741. Under former Acts the right of appeal given

did not affect the existing law or practice in any province as to setting aside awards (see R.S.C., cap. 37, sec. 209 (4)); nor the common law rights of the parties to move against the award. No proceedings of this nature may now be had except by appeal under this section. No question as to the constitutionality of this provision has yet been raised in any reported case. Under former section 209 (4) it was held that provincial Arbitration Acts applied to all awards where the particular Act did not itself prescribe a mode for enforcement: **Re Horseshoe Quarry Co. and St. Mary's, etc., Ry. Co.**, 12 C.R.C. 155, 22 O.L.R. 429; **In re Myerscough and Lake Erie, etc. Ry. Co.**, 4 O.W.N. 1248, 15 C.R.C. 168, 11 D.L.R. 458. Possibly these Acts do not now apply. If they do apply it has been held that failure of the arbitrators after a view of the lands in question, to put in writing a statement sufficiently full to enable a judgment to be formed of the weight which should be attached to their finding as required by a provincial Arbitration Act. 9 Ed. 7 (Ont.), c. 355, s. 17 (3), is not a ground for setting aside an award; it will be referred back for a supplementary certificate: **In re Myerscough and Lake Erie, etc., Ry. Co.**, *supra*.

The following principles have been laid down as to appeals from and motions against awards.

An appeal upon a question which is merely one of value should be discouraged: **Musson v. Canada Atlantic Ry. Co.** (P.C.) 17 L.N. 179 at p. 181. In cases of this nature the Court in reviewing the verdict of a jury, or a report of referees, upon questions of fact, cannot reverse unless there is such a plain and decided preponderance of evidence against the finding of the arbitrators or commissioners as to border strongly on the conclusive.

This rule should perhaps be still more strictly adhered to on an arbitrator's award than on a verdict of a jury where the arbitrators are experienced in such matters, have local knowledge, and the great advantage of a personal view of the premises, and of seeing and hearing the witnesses: **Kearney v. The Queen**, Cam. S.C. Cas. 344, 347, followed in **Lemoine v. Montreal**, 23 S.C.R. 390 at p. 392 and **C.N.R. v. C. M. Billings**, 19 C.R.C. 193, 31 D.L.R. 687; and see **Lake Erie, etc., Ry. Co. v. Muir**, 21 C.R.C. 350, 32 D.L.R. 252.

The court will not interfere to set aside an award unless corruption, partiality, misconduct or irregularity is distinctly proved against the arbitrators, and mere suspicion is not sufficient; or unless the sum awarded is so

grossly and scandalously inadequate as to shock one's sense of justice: **Morley v. Klondyke, etc., Ry. Co.**, 6 C.R.C. 183, and notes, *ibid*; **Harrigan v. Klondyke, etc., Ry. Co.**, *ibid*, p. 193; **Benning v. Atlantic, etc., Ry. Co.**, M.L.R. 5, S.C. 136, M.L.R. 6, Q.B. 385, 20 Can. S.C.R. 177.

On an appeal an award will not be set aside merely because the appellate court disagrees with the reasoning of the arbitrator, but will stand if it can be supported on any other grounds sufficient in law. **In re Ketcheson v. C.N.R.**, 29 O.L.R. 339, 16 C.R.C. 286, 13 D.L.R. 854; affirmed 21 C.R.C. 104, 32 D.L.R. 629; and see **Green v. C. N.R.**, 8 Sask. L.R. 53, 19 C.R.C. 139, 171.

An award will not be disturbed unless the arbitrators manifestly erred in some principle in arriving at their conclusion: **Robinson v. C.N.R.**, 17 Man. R. 396; **Cedar Rapids Co. v. Lacoste** (1914) A.C. 569; **C.N.R. v. Billings**, 19 C.R.C. 193; **Lake Erie, etc., Ry. Co. v. Muir**, 21 C.R.C. 350; and see **Davies v. James Bay Ry. Co.**, 10 C.R.C. 225; **James Bay Ry. Co. v. Armstrong** (1909) A.C. 624; **Calgary, etc., Ry. Co. v. MacKinnon**, 43 S.C.R. 379.

The provision that the court shall decide questions of fact upon the evidence taken before the arbitrator as in the case of original jurisdiction does not mean that the court must entirely disregard the judgment of the arbitrator, but it gives the court the power to reform the award in case he has decided it on a wrong principle, or taken an erroneous view of the evidence.

Where the arbitrator has not proceeded on a wrong principle and where the award is not so excessive or so small as to shew that due regard has not been paid to the evidence the court will not interfere: **St. John, etc., Ry. Co. v. Fraser**, 19 C.R.C. 177, 24 D.L.R. 339. The appellate court is not authorised by the Act to disregard the award and deal with the evidence *de novo* as if it had been a court of first instance. See **Coghlan v. Cumberland** (1898) 1 Ch. 704, at pp. 704-705, cited by Riddell, J., in **In re Cavanagh and Canada Atlantic Ry. Co.**, 6 C.R.C. 395, 398; 14 O.L.R. 523, 526. The true rule is no doubt that laid down by the judicial committee in **Atlantic, etc., Ry. Co. v. Wood** (1895), A.C. 257, approved of in **James Bay Ry. Co. v. Armstrong** (1909) A.C. 624, 10 C.R.C. 1; re-stated in somewhat different language in **Ruddy v. Toronto Eastern Ry. Co.**, *supra*, that the appellate court should deal with the award as they would with the judgment of a subordinate court, when under appeal; **C.N.R. v. C. M. Billings**, 19 C.R.C. 193, at p. 205; and see

In re National Trust Co. and C.P.R., 29 O.L.R. 462, 16 C.R.C. 291, 15 D.L.R. 320; **Lake Erie, etc., Ry. Co. v. Muir**, 21 C.R.C. 350.

Where the arbitrators fixed a lump sum, and on an appeal it was proved that the arbitrators admitted evidence of damages not legally the subject of compensation, the appellate court set aside the award and made the findings which the arbitrators should have made on the evidence given before the arbitrators: **Ontario, etc., Ry. Co. v. Vallières**, Q.R. 36, S.C. 349, 11 C.R.C. 1.

An award allowing compensation for depreciation of the untaken remainder of the owner's land, resulting from the operation of the railway elsewhere than upon the land so taken, was set aside in **C.P.R. v. Gordon**, 8 C.R.C. 53.

The nullity of one part of an award only entails the nullity of the remainder if the award is indivisible, or if one of the parties suffers prejudice: **Ontario, etc., Ry. Co. v. Vallières**, *supra*.

The written opinions or reasons of an arbitrator may be looked at for the purpose of ascertaining the principle upon which he has computed the compensation, but not to vary the award.

He is under no legal obligation to give reasons for an award, and cannot be interrogated or examined under oath for the purpose of obtaining his reasons. **The Duke of Buccleuch v. Metropolitan Board of Works**, L.R. 5, H.L. 418; **Clarkson (Lloyd) v. Campbellford, etc., Ry. Co.**, 35 O.L.R. 345, 21 C.R.C. 330. But when the court before which an appeal from the award is pending asks for reasons, the arbitrator should, it seems, comply. See annotation, 21 C.R.C. at p. 333. Evidence of his reasons could not formerly be given on appeal: **Ontario, etc., Ry. Co. v. Vallières**, *supra*; and see **Pontiac, etc., Ry. Co. v. Sisters of Charity**, Q.R. 20, S.C. 567, where it was held that on an appeal under former sec. 209, no new evidence could be adduced, and no objection based upon the admission of illegal evidence or the exclusion of legal evidence, could be considered, unless the illegalities appeared on the record; and that the award could not be explained or varied by extrinsic evidence of the intention of the arbitrators.

Paying Money Into Court, etc.

- 233.** (1) (a) If the company has reason to fear any claim, mortgage, *hypothèque*, or encumbrance; or,

Payment of compensation into court in some cases.

- (b) If any person to whom the compensation or annual rent, or any part thereof, is payable, refuses to execute a proper conveyance; or,
- (c) If the person entitled to claim the compensation or annual rent cannot be found, or is unknown to the company; or,
- (d) If, for any other reason, the company deems it advisable;

the company may pay such compensation into court, with the interest thereon for six months, and may deliver to the clerk or prothonotary of such court an authentic copy of the conveyance or of the award or agreement, if there is no conveyance.

(2) Such conveyance, or award or agreement, shall thereafter be deemed to be the title of the company to the land therein mentioned. R.S., c. 37, s. 210. Am. Title.

Former section 210, except that the words "and guarantee" are omitted after the word "conveyance" in sub-sec. (1) (b).

The payment into court under this section is payment of the actual compensation, and not security as under secs. 240 and 241. See the notes to sec. 205 *et seq.*, *supra*.

Under a similar enactment of the Province of Quebec (R.S.Q. (1909) Article 7599) if the party taking the expropriation proceedings has reason to fear any hypothecary claims, or has other reasons, he may deposit the amount of the compensation with the prothonotary of the district in which the lands to be expropriated are situated, with six months' interest, together with a copy of the award. The article contains provisions similar to sub-sec. (2) of this section making the award the title to the land, and to section 237 providing for adjudication of claims and distribution, payment or investment of the compensation.

In **Dufresne v. City of Montreal**, Q.R. 53 S.C. 337, it was held (1) that payment into Court by the expropriator under an agreement with the land-owner extending the time within which compensation was payable under the Act and providing that the compensation must

be paid into Court ("La Cité devra déposer les dits montants entre les mains du Protonotaire de la Cour Supérieure") was not a payment into Court within the meaning of the Article; (2) that payment into Court under the Article is a **deposit** only, and not such a payment of the compensation as would discharge the expropriator and (3) that a tax levied on the deposit was payable by the expropriator. The difference in the wording of the two Acts is, however, significant. The Quebec Act provides that the expropriator "may deposit the amount of the compensation" while under this section "the Company may pay such **compensation** into Court."

If there is no agreement for the sale of the land, and no agreement to sell, subject to the terms being settled by arbitration, this section applies only to lands within the limitation contained in sec. 199. And see sec. 236.

See *Chateauguay, etc., Ry. Co. v. Laurier*, 9 Que. P.R. 245, 9 C.R.C. 51, for proceedings under this section to clear title after award.

Lands not in
Quebec.

Publication
of notice.

234. (1) Where the lands are situated elsewhere than in the province of Quebec, a notice of such payment and delivery, in such form and for such time as the court appoints, shall be inserted in a newspaper, published in the county in which the lands are situated, or, if there is no newspaper published in the county, then in the official gazette of the province, and also in a newspaper published in the nearest county thereto in which a newspaper is published.

What notice
shall state.

(2) Such notice shall state that the conveyance, agreement or award constituting the title of the company is obtained under the authority of this Act, and shall call upon all persons claiming an interest in or entitled to the lands, or any part thereof, to file their claims to the compensation, or any part thereof. R.S., c. 37, s. 211.

Lands in
Quebec.

235. Where the lands are situated in the province of Quebec the notice shall be published as required in cases of confirmation of title, and the registrar's certificate shall be procured and filed as in such cases. R.S., c. 37, s. 212.

Former sec. 212 with the word "certificate" in the third line substituted for "certificates."

236. The compensation for any lands which may be taken without the consent of the owner shall stand in the stead of such lands; and any claim to or encumbrance upon the said lands, or any portion thereof, shall, as against the company, be converted into a claim to the compensation, or to a like proportion thereof; and the company shall be responsible accordingly, whenever it has paid such compensation or any part thereof to a person not entitled to receive the same, saving always its recourse against such person; but nothing herein contained shall prejudice any owner's right to a lien for unpaid purchase money unless such compensation is actually paid to such owner or paid into court pursuant to this Act. R.S., c. 37, s. 213. Am.

Compensation in place of land.

Encumbrances.

Lien for purchase money.

Former sec. 213 with the addition of the clause saving the owner's vendor's lien. The limitation in sec. 199 applies to this section; and the protection of the section applies only in the case of "lands which may be taken without the consent of the owner"—not lands acquired by voluntary sale beyond that limitation.

The meaning of this section is stated by Street, J., in **Young v. Midland Ry. Co.**, 16 O.R. at p. 740, to be that the estates in the land become estates in the compensation. Until the death of the tenant for life, the statute does not begin to run against those entitled to the reversion in fee.

Under this section it has been held that a mortgagee, not a party to the award, may adopt it and foreclose as to the compensation awarded. **Scottish American Inv. Co. v. Prittie**, 20 A.R. 398.

The right to recover compensation is statutory, and an action to enforce it, is not barred until twenty years after the cause of action arose, i.e., when the railway company entered on the land. **Ross v. G.T.R.**, 10 O.R. 447; **Essery v. G.T.R.**, 21 O.R. 224.

In the case of damage by the construction of an embankment, it was held that the action was barred by the lapse of six years: **Chaudiere, etc., Co. v. Canada Atlantic Ry. Co.**, 33 S.C.R. 11.

Where a railway company took lands without the leave of the owner, taking no arbitration proceedings, and obtaining no order for leave or right to enter upon

the lands, the claim to the lands was converted into a claim for compensation, and this claim retained its character of real estate and descended to the heir-at-law. **Essery v. G.T.R.**, *supra*. Approved in **Re Ruttan and Dreifus and C.N.R.**, 12 O.L.R. 187, 5 C.R.C. 339, at p. 344.

Under the special Statutes relating to the Grand Trunk and Great Western Ry. Cos., and the Railway Clauses Consolidation Act 14 & 15 Vic., ch. 81, and 18 Vic., ch. 33, it was held that an action did not lie to recover the lands taken, but must be for compensation: **Clarke v. G.T.R.**, 35 U.C.R. 57; **McLean v. G.W.R.**, 33 U.C.Q.B. 198.

Where the compensation has been fixed an action for dower cannot be maintained but claim must be made upon the compensation. **Chewett v. G.W.R.**, 26 U.C.C.P. 118.

Where the amount of compensation had been fixed by an award and pending an appeal the owner died, it was held that his personal representative was entitled to this amount, as against the trustees of his realty: **Hoskin v. Toronto General Trusts**, 6 C.L.T. 529, following **Nash v. Worcester Improvement Commissioner**, 1 Jur. N.S., pt. 1, 973, but see the Devolution of Estates Act, R.S.O., cap. 119, sec. 3.

Effect of
adjudication.

237. (1) All such claims filed shall be received and adjudicated upon by the court, and the adjudication thereon shall for ever bar all claims to the land, or any part thereof, including any dower, mortgage, **hypothèque** or encumbrance upon the same.

Disposal of
compensation.

(2) The court shall make such order for the distribution, payment, or investment of the compensation and for the security of the rights of all persons interested, as to right and justice and to law appertains.

Interest.

(3) If the order for distribution, payment, or investment is obtained within less than six months from the payment of the compensation into court, the court shall direct a proportionate part of the interest to be returned to the company.

For further
period.

(4) If from any error, fault or neglect of the company, such order is not obtained until after six months have expired, the court shall order the company to pay into court, as part of the compensation, the interest for such further period as is right.

(5) The costs of the proceedings, in whole or in part, Costs. including the proper allowances to witnesses, shall be paid by the company, or by any other person, as the court orders. R.S., c. 37, s. 214.

In spite of the provisions of sec. 233, it is necessary to obtain an order barring all claims under this Act where money is paid into court under that section. The order should be obtained promptly, as in the case of delay for more than six months, through any error, fault or neglect of the company, a payment of further interest may be ordered. But an adjudication under this section is not necessary to bar claims to the land, as against the company. Once the compensation is ascertained, the claim, as against the company, is for compensation only, and the recourse of the company against a person who has received compensation, but is not entitled thereto, is saved. See sec. 236.

As to costs under sub-sec. 5, see **Chateauguay & Northern Ry. Co. v. Laurier**, 9 Q.P.R. 245 (9 C.R.C. 51.)

Payment of the compensation into Court under these latter sections would appear to be made at the risk of paying the owner's costs, if done unreasonably: **Harrison v. Alliance Assurance Co.** (1903), 1 K.B. 188 (decided under the corresponding provision of the Life Assurance Companies Payment into Court Act, 1896, sec. 3, which provides that any Life Assurance Company may pay into the High Court any moneys payable to them under a life policy in respect of which, in the opinion of the Board of Directors, no sufficient discharge can otherwise be obtained).

As to interest on awards generally see sec. 221.

As to interest after expiration of six months, see **Atlantic, etc., Ry. Co. v. Judah**, 23 S.C.R. 231, decided under sections 170 and 172 of the Act of 1888, which provided, in Quebec, for a judgment of confirmation of title after payment into court.

Right of Company to Take Possession.

238. Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon the payment into court of the amount of such compensation, in the manner hereinbefore mentioned, the award or agreement

Upon payment or tender.

shall vest in the company the power forthwith to take possession of the lands, or to exercise the right, or to do the thing for which such compensation or annual rent has been awarded or agreed upon. R.S., c. 37, s. 215.

Payment or tender of the compensation or annual rent awarded or agreed upon does not justify a forcible entry by the railway company. See **Martini v. Gzowski**, 13 U.C.R. 298. A warrant for possession should be obtained. See note to sec. 239.

Proceedings in Case of Resistance.

Warrant.

239. (1) If any resistance or forcible opposition is made by any person to the exercise by the company of any such power the judge shall, upon or without notice to the opposite party as he deems proper, on proof to his satisfaction of such award or agreement, and of payment or tender of the sum awarded or agreed upon or of payment thereof into court, issue his warrant to the sheriff of the district or county, or to a bailiff, as he deems most suitable, to put down such resistance or opposition, and to put the railway company in possession.

How
executed.

(2) The sheriff or bailiff shall, in the execution of such warrant, take with him sufficient assistance for such purpose, and shall put down such resistance or opposition and put the company in possession. R.S., c. 37, s. 216. Am.

Former sec. 216. The provisions as to notice on the opposite party, and proof of payment, tender or payment into Court are new.

The word "may" appearing after the word "judge" in this section as it stood in earlier Acts was changed to "shall" in the Act of 1903, thus making the section imperative. Until the requirements of this section have been complied with (unless a warrant has been granted under section 240), the entry of the company is premature and illegal. **Martini v. Gzowski**, 13 U.C.R. 298.

In **Todd v. Meaford and G.T.R.**, 6 O.L.R. 469, the plaintiff having precluded himself by agreement from treating the railway company as trespassers,—held that his remedy against the company was by arbitration proceedings under the Railway Act, and not by action.

As to persons to whom payment should be made see secs. 205 **et seq.**, and notes thereto.

Payment into Court is not a condition of the issue of a warrant under this section, if tender has been made. As to the right of appeal, see notes to sec. 243.

240. Such warrant shall also be granted by the judge without such award or agreement, on affidavit to his satisfaction that the immediate possession of the lands or of the power to do the thing mentioned in the notice, is necessary for the construction or maintenance of some part of the railway with which the company is ready forthwith to proceed. R.S., c. 37, s. 217.

Warrant for immediate possession in certain cases.

Former sec. 217. The words "for the construction or maintenance of" have been substituted for the words "to carry on" in the former section. See sec. 241.

In **C.P.R. v. Little Seminary of St. Thérèse**, 16 S.C.R. 606, Paterson and Gwynne, J.J.S.C., were of opinion that the order for possession under this section could only be made when the land was required for immediate use, in carrying on some part of the railway with which the company is willing to proceed.

In **Kingston & Pembroke Ry. v. Murphy**, 11 P.R. 304, 17 S.C.R. 582, the order for possession was refused, because it was not clearly established that the company had an indisputable right to acquire the land by compulsory proceedings, and that there was some urgent and substantial need for immediate action. See **Williams and G.T.R.**, 6 C.R.C. 200; **Marsan v. G.T.P.**, 2 Alta. L.R. 43, 9 C.R.C. 341.

Where statutory requirements, as plans, etc., have not been substantially complied with, a warrant granted under this section is without jurisdiction, an entry under it is a trespass, and an action will lie for an injunction and damages: **Marsan v. G.T.P. Ry. Co.**, 9 C.R.C. 341, 2 Alta. L.R. 43; **Girouard v. G.T.P. Ry. Co.**, 9 C.R.C. 354, 2 Alta. L.R. 54.

241. (1) The judge shall not grant any warrant under the last preceding section, unless,—

Procedure upon application for such warrant.

- (a) ten days' previous notice of the time and place when and where the application for such warrant is to be made has been served upon the

Notice.

owner of the lands, or the person empowered to convey the lands or interested in the lands sought to be taken, or which may suffer damage from the taking of materials sought to be taken, or the exercise of the powers sought to be exercised, or the doing of the thing sought to be done by the company; and,

Deposit of
compensa-
tion.

- (b) the company gives security to his satisfaction, by payment into court, of a sum in his estimation sufficient to cover the probable compensation and costs of the arbitration, and not less than fifty per centum above the amount offered by the company in the notice mentioned in section two hundred and fifteen, or certified by the surveyor or engineer under section two hundred and sixteen, whichever is larger; or, if the judge deems proper, pays the party in part and gives security for the balance.

Where
notice
cannot be
served.

(2) Where for any reason service of such notice can not be made, or can not be made promptly, the judge may, on proof to his satisfaction of circumstances justifying it, order substitutional or other service of such notice or dispense with such notice. R.S., c. 37, s. 218. Am.

Former section 218. The new provisions as to determining the amount of security to be given were rendered necessary by the change made in the law by sections 215, 216 and 222 **q.v.** The provision for part payment and giving security for the balance is also new. See **McCarthy v. Tillsonburg, etc., Ry. Co.**, 12 C.R.C. 272 (Middleton, J., Ont.). Sub-sec. (2) is new.

No provision is made for service by advertisement as in section 217.

In **Re Ontario Tanners' Supply Co. and Ontario & Quebec Ry. Co.**, 12 P.R. 563, it was held that in the computation of the ten days' notice, the day of the service of the notice and the day of the return must both be excluded.

In **Jenkins v. Central Ontario Ry. Co.**, 4 O.R. 593, it was held that the High Court had jurisdiction to enjoin the taking of possession, notwithstanding the order of the

County Court judge for immediate possession made under the Railway Act of Ontario, R.S.O. 1877, cap. 165, sec. 20, sub-sec. 23, if the company were making use of their powers to attain any object collateral to that for which it was incorporated; but otherwise it was not within the jurisdiction of the judge of the High Court to interfere with an order of the County Court judge, though granted **ex parte**. By section 243 the County Court judge has practically the same jurisdiction as under the Ontario Act.

In the case of **Clarke v. Toronto, etc., Ry. Co.**, 18 O. L.R. 628; 9 C.R.C. 290; Sir William Meredith, C.J.O., (not R. M. Meredith, C.J.C.P., as stated in the above cited reports) expressed the opinion that the money paid into court under this section was intended as security only, and that it could not be regarded as the compensation and costs of the arbitration or portion thereof; consequently a railway company paying money into court as provided in this section is still liable for interest at the current legal rate, no matter what rate is being paid by the court.

Service on the registered owner is sufficient under this section. **Sanders v. Edmonton, etc., Ry. Co.**, 16 C.R.C. 142, 14 D.L.R. 88, 18 C.R.C. 71, 18 D.L.R. 633; **In re Edmonton, etc., Ry. Co.**, 16 C.R.C. 396, 15 D.L.R. 938. As to right of appeal, see sec. 243.

242. (1) The costs of any such application and hearing before the judge shall be borne by the company, unless the compensation awarded is not more than the company had offered to pay. Costs.

(2) No part of such deposit or of any interest thereon shall be repaid, or paid to such company, or paid to such owner or party, without an order from the judge, which he may make in accordance with the terms of the award. Repayment
of deposit.
R.S., c. 37, s. 219.

Former section 219.

Under the corresponding section in the Act of 1888 (165), where the amount awarded is not more than the amount offered by the company, it was decided that the owner must pay the costs of the application for the warrant.

Re Shibley and the Napanee, etc., Ry. Co., 13 P.R. 237; **Re Vancouver, etc., Ry. & Navigation Co., and Milsted**, 13 B.C.R. 187; 7 C.R.C. 257.

Procedure.

To be continued in court where commenced.

Different interests.

243. Any proceeding under the foregoing provisions of this Act relating to the ascertainment or payment of compensation, or the delivery of possession of lands taken, or the putting down of resistance to the exercise of powers, shall, if commenced in a superior court having jurisdiction, be continued in such superior court, or, if the proceeding is commenced in a county court having jurisdiction, it shall be continued in such county court; and where there are different interests in the same lands all shall as far as possible be dealt with in one proceeding. R.S., c. 37, s. 220. Am.

Former section 220. The provision as to dealing with different interests in one proceeding is new. See **Montreal, etc., Ry. Co. v. Woodrow**, 10 C.R.C. 496, 11 Que. P.R. 230; **Pacific Great Eastern Ry. Co. v. Larsen**, 8 W. W.R. 1.

There is a right of appeal by virtue of the section from orders made under sections 239-242. It was held in **Sanders v. Edmonton, etc., Ry. Co.**, 16 C.R.C. 142, 14 D.L.R. 88, that by virtue of former sec. 220, proceedings under former sec. 217 (now 240) were proceedings in Court and the judge in granting the warrant was acting as a judge of the Court. Orders made by him would be effective according to the usual practice of the Court and were subject to appeal. That a decision of a single Judge as **persona designata** is not appealable may no longer be law since this amendment. **Marsan Case**, *infra*, per Stuart, J. A warrant for possession having been granted by a judge having general jurisdiction cannot be treated as a nullity but must be considered effective for the purpose intended unless and until set aside in the regular way and even though there had been a failure to comply with some of the statutory provisions it would still not be void but only irregular, and see **In re Edmonton, etc., Ry. Co.**, 16 C.R.C. 396, 15 D.L.R. 938; **Marsan v. G.T.P. Ry. Co.**, 2 Alta. L.R. 43, 9 C.R.C. 341; **C.P.R. v. St. Thérèse**, 16 S. C.R. 606; **Girouard v. G.T.P. Ry. Co.**, 2 Alta. L.R. 54, 9 C. R.C. 354; *re G.T.P. and Marsan*, 3 Alta. L.R. 65; **Chambers v. C.P.R.**, 20 Man. L.R. 277.

Matters Incidental to Construction.

Respecting Wages.

Current rate.

244. (1) In every case in which the Parliament of

Canada votes financial aid by way of subsidy or guarantee towards the cost of railway construction, all mechanics, labourers or other persons who perform labour in such construction shall be paid such wages as are generally accepted as current for competent workmen in the district in which the work is being performed; and if there is no current rate in such district, then a fair and reasonable rate.

(2) In the event of a dispute arising as to what is the current or a fair and reasonable rate, it shall be determined by the Minister, whose decision shall be final. R. S., c. 37, s. 259.

Minister may determine.

Former sec. 259.

This section is the same as section 205 in the Act of 1903, with a difference in paragraphing.

Similar legislation is to be found in various provincial enactments which grant subsidies to railways and which impose as a term of payment a provision that all workmen employed on the undertaking shall be paid the current rate of wages in the locality. See, for instance, 4 Edw. VII., cap. 18, sec. 6 (2) (Ont.), and similar general provisions for payment of labourers employed on public works or on railways chartered by the Province; contained in R.S.O. (1914), cap. 142, sec. 6, and cap. 185, sec. 267.

The above provision is so general in its terms that it would appear to be necessary for subsidized railways to exact a similar stipulation from all persons to whom they let contracts for the construction of any portions of their roads which may be subsidized.

The term "Minister" employed in this section refers to the Minister of Railways and Canals under section 2 (17), *ante*, and not to the Minister of Labour.

Respecting Navigable Waters.

245. No company shall cause any obstruction in, or impede the free navigation of any river, water, stream or canal, to, upon, along, over, under, through or across, which its railway is carried. R.S., c. 37, s. 230.

Navigation not to be obstructed.

Former section 230.

The power to cross navigable waters is given by sec.

162, sub-secs. (k) and (l), *ante*. The exercise of this power is, of course, subject to sections 245-251. For similar English provisions see 8 Vic., cap. 20, secs. 16 and 17, and 26 & 27 Vic., cap. 92, secs. 13 to 15 (Imp.). A navigable river is, for the purposes of navigation, a highway and the principles governing the use of a highway by the public are largely applicable to the use of navigable waters. The subject has been dealt with at length in such cases as **Reg. v. Betts**, 16 Q.B. 1022; **Attorney-General v. Johnson**, 2 Wilson Ch. 87; **Attorney-General v. Lonsdale**, L.R. 7 Eq. 377, at p. 389; **Drake v. Sault Ste. Marie Pulp Co.**, 25 A.R. 251. So far as interference with navigable water constitutes a nuisance to the public it is properly the subject of indictment or information, but where in addition any private individual can show that he suffers a special damage different from that suffered by the public at large it may also be the subject of a civil action: **Attorney-General v. Lonsdale**; **Drake v. Sault Ste. Marie, etc., Co.**, *supra*. And the same rule applies in Quebec: **Bell v. Quebec**, 5 A.C. 84.

The right of access to the waterway from riparian lands is a private right which the owner of the land enjoys *qua* owner; such right is analogous to the "droits d'accès et de sortie" recognized by the French law: **Bell v. Quebec**, *supra*; **Lyon v. Fishmongers**, 1 A.C. 662; **Attorney-General v. Conservators, etc.**, 1 H. & M. 1. But this right of access is distinct from the right of navigation which a riparian proprietor may have upon the river in common with the public generally and whether this is a private right for which an action of damages will lie or one for compensation under the act was not determined by these cases and it was said to be open in **Bell v. Quebec**. Where for a large part of the year the river is the only means of access then at least the riparian proprietor would be entitled to his private right of action under the **Drake Case**. The case of **Crandell v. Mooney**, 23 U.C.C. P. 212, went further and held that the plaintiff, a steam boat owner, who was prevented from plying his trade or calling by obstructions in a river, had a private right of action, relying for this upon **Winterbottom v. Lord Derby**, L.R. 2 Ex. 316; and **Rose v. Miles**, 4 M. & S. 101. The general subject was much discussed in **Caldwell v. McLaren**, 9 A.C. 392, reversing **McLaren v. Caldwell**, 5 A.R. 363, 8 S.C.R. 435, and overruling **Boale v. Dickson**, 13 U.C.C.P. 337.

The case of **Bell v. Quebec**, *supra*, further decided that whether an obstruction amounts to an interference

with a riparian proprietor's access to his frontage is a question of fact to be determined by the circumstances of each case and the rights of riparian proprietors in this respect are said to be the same under both English and French law: **Miner v. Gilmour**, 12 Moore P.C. 131. The construction of a railway upon the foreshore of a navigable river thereby obstructing the owner's access to the water gives him a right of action or a right to compensation as the case may be even though the company leaves openings therein which would enable him to reach the water: **North Shore Ry. Co. v. Pion**, 14 A.C. 612; **Bigaouette v. North Shore Ry. Co.**, 17 S.C.R. 363; and the same result follows where a riparian owner's access to the sea is cut off; **Reg. v. Rynd**, 16 Ir. C.L. 29. Where a railway company caused the river to swell by the construction of its bridge thereby damaging the plaintiff's bridge by reason of flood, it was held that a right of action accrued, but as the damage was done "by reason of the railway" the plaintiffs were limited to one year within which to bring their action under sec. 287 of the Railway Act (1888): **Tingwick v. G.T.R.**, 3 Q.L.R. 111; but where a company acting lawfully in pursuance of statutory powers and without negligence caused damage by the bursting of a boom, it was held in Ontario that it was not liable therefor: **Langstaff v. McRae**, 22 O.R. 78; where, however, damage is continued for a considerable period as by obstructing free navigation of the stream the time begins to run from the date when the damage has ceased. **Snure v. Great Western Ry. Co.** (1856) 13 U.C.R. 376.

It is no defence to a railway company to say that it has impeded navigation as little as possible consistently with the execution of its works unless, of course, the statute permits an obstruction: *ibid.*

In **Small v. G.T.R.**, 15 U.C.R. 283, the general rule is repeated that the plaintiff must show some injury peculiar to himself such as impeding him in carrying on his trade or business before he can maintain a civil action for an obstruction. It is also laid down in that case that it is a question of fact for a jury whether the river is navigable or not. Where a statute authorising the construction of a bridge across navigable waters prescribes the method by which compensation is to be obtained that method must be followed and the person injured cannot bring an action for his damages: **St. Andrew's Church v. Great Western Ry. Co.** (1862), 12 U.C.C.P. 399, and a writ of mandamus to proceed according to statute to fix compensation for damages caused by the erection of a

bridge was granted where the company had refused to comply with the statutory requirements for ascertaining the compensation to be paid: **Reg. v. Great Western Ry. Co.**, 14 U.C.C.P. 462. Where a bridge already erected over a canal had been referred to by various Acts of Parliament, it was held that it might be assumed from these statutory references to it that it was lawfully placed at that point, even though it could not be proved that it had been authorised by the Governor-in-Council under the Railway Act, C.S.C., cap. 66, secs. 137 and 138: **Desjardins Canal Co. v. Great Western Ry. Co.**, 27 U.C.R. 363.

In the **Yonge Street Bridge Case (G.T.R. v. Toronto, and C.P.R. v. Toronto)**, 6 Ont. W.R. 852, and 10 Ont. W. R. 483, and the **Toronto Viaduct Case (G.T.R. v. Toronto)**, 42 S.C.R. 613; it was held that the public right of access to the harbour was not extinguished by the construction of the railway. Duff, J., dissenting, affirmed **C.P.R. v. Toronto & G.T.R.** (1911), A.C. 461.

Where a railway company constructed a solid embankment across a navigable cove or harbour, not having obtained the approval of its route by the Minister, the Board was held to have jurisdiction to order an opening to be made in the embankment. **Rochester v. G.T.P. Ry. Co.**, 13 C.R.C. 421, 48 S.C.R. 238, 15 C.R.C. 306.

A railway company cannot be compelled to carry its right of way fences over a stream of which it does not own the bed. **Abrey v. C.P.R.**, 23 C.R.C. 17.

An obstruction of the upper waters (non-tidal) of the Fraser River by the erection of a railway bridge, renders the company liable to damages. **Fort George Lumber Co. v. G.T.P.**, 24 D.L.R. 527.

Bridges to
be properly
floored.

246. No company shall run its trains over any canal, or over any navigable water, without having first laid, nor without maintaining, such proper flooring under and on both sides of its railway track over such canal or water as is deemed by the Board sufficient to prevent anything falling from the railway into such canal or water, or upon the boats, vessels, craft, or persons navigating such canal or water. R.S., c. 37, s. 231.

Former section 231.

Spans of
headway and
waterway.

247. (1) Whenever the railway is, or is proposed to be carried over any navigable water or canal by means of a bridge, the Board may by order in any case, or by

regulations, direct that such bridge shall be constructed with such span or spans of such headway and waterway, and with such opening span or spans, if any, as to the Board may seem expedient for the proper protection of navigation.

(2) The Board may in like manner, if any such bridge is a draw or swing bridge, direct when, under what conditions and circumstances, and subject to what precautions, the same shall be opened and closed. R.S., c. 37, s. 232. Operation of draw.

Former section 232.

Where under a previous similar enactment a swing bridge was erected over a canal, it was held that if the requirements of railway traffic required that the bridge be kept closed temporarily and notice was given to an approaching vessel of this fact, the railway company was not bound to open the bridge immediately upon the vessel's approach and were not liable for injury caused by the latter running into it: **Turner v. Great Western Ry. Co.**, 6 U.C.C.P. 536, and see **Desjardins Canal Co. v. Great Western Ry. Co.**, 27 U.C.R. 363; and where a plaintiff sought to have a swing bridge substituted for a fixed one, but a statute had been passed enabling the Railway Commissioners to deal with such matters, it was held that any change in the character of the bridge was a proper subject for the Commissioners and not for the courts, and that in any case such a change could not be enforced in a civil action brought by the private individual, but only by the Attorney-General acting on behalf of the public: **Cull v. G.T.R.**, 9 Gr. 491.

248. (1) When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work, in, upon, over, under, through or across any navigable water or canal, or upon the beach, bed or lands covered with the waters thereof, the company shall, before the commencement of any such work,— Proceedings for construction of works in navigable waters.

(a) in the case of navigable water, not a canal, submit to the Minister of Public Works, and in the case of a canal to the Minister, for approval by the Governor in Council, a plan and description of the proposed site for such work, and a general plan of the work to be constructed, to the satisfaction of such Minister; and, Approval by Governor in Council.

Board to
authorise.

- (b) upon approval by the Governor in Council of such site and plans, apply to the Board for an order authorising the construction of the work, and, with such application, transmit to the Board a certified copy of the Order in Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may, in any such case, or by regulation, require.

No deviation

- (2) No deviation from the site or plans approved by the Governor in Council, shall be made without the consent of the Governor in Council.

Powers of
Board.

- (3) Upon any such application, the Board may,—

- (a) make such order in regard to the construction of such work upon such terms and conditions as it may deem expedient;
- (b) make alterations in the detail plans, profiles, drawings and specifications so submitted;
- (c) give directions respecting the supervision of any such work; and,
- (d) require that such other works, structures, equipment, appliances and materials be provided, constructed, maintained, used and operated, and measures taken, as under the circumstances of each case may appear to the Board best adapted for securing the protection, safety and convenience of the public.

Company to
construct.

- (4) Upon such order being granted, the company shall be authorised to construct such work in accordance therewith.

Operation
also to be
authorised
by Board.

- (5) Upon the completion of any such work, the company shall, before using or operating the same, apply to the Board for an order authorising such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with,

the Board may grant such order. R.S., c. 37, s. 233.

Former section 233.

It will be noted that not only must the orders of the Board be obtained, but plans must be submitted to the Minister having charge of the canal or of the navigable water and must be approved of by the Governor-General in-Council upon the recommendation of that Minister. Under the former section the approval of the Railway Committee of the Privy Council was all that was required.

The Vancouver Westminster and Yukon Railway Co. having applied under what are now secs. 180 and 183, for authority to construct branches or spurs in the city of Vancouver, the question arose, where the proposed branch line or spur involved the crossing of a navigable water, whether the Board could authorise such construction before the approval by the Governor-in-Council of the site and plans of the work as required under sec. 248. It was held that while there was no doubt that False Creek and the arm of the sea, as navigable waters, required the approval of the Governor-in-Council of the site and plans of the work before it could be constructed, such approval was not a necessary condition precedent to the granting of the application by the Board. Chief Commissioner Killam: "The converse is, to my mind, the case; the authority to build a branch is a condition precedent to the application for approval of the site and plans of so much as crosses navigable water. In my opinion, the granting of authority by the Board to build a branch does not, of itself, relieve a railway company from liability to comply with the other provisions of the Railway Act; it does not of itself, authorise the grading of the line across a highway or another railway without specific leave therefor from the Board, though it is convenient in many cases to determine upon the one application, or at the same time, whether the last mentioned leave should be given, as in many cases circumstances affecting applications for such leave might well have to be considered in determining whether the branch should be allowed, and the parties interested in the railway or highway crossings might well be heard upon the original application. In many cases it may well appear that the objection to such modes of crossing highways or railways as are found practicable, is such that no authority should be given for the construction of the branch, and, in the present case, the Board is entitled to take into consideration the extent to which any of these lines would probably obstruct navigation before determining the application."

April 10, 1907, p. 222 Fourth Report, Board of Railway Commissioners (1909).

Former section 233 was considered in **G.T.P. v. B.C. Express Company**, 55 S.C.R. 328, where a bridge placed across the Fraser River was held unlawful and the railway company held liable for any actual damages sustained by the respondent such as would support a private action in respect of a public nuisance, per Anglin, J., but the action was dismissed on the ground that the construction of the bridge was not, upon the evidence, the cause of the non-user of the river by the respondents' steamboat.

Bridges, Tunnels and Other Structures.

Bridges.

249. (1) The Governor in Council may, upon the report of the Board, authorise or require any railway company to construct fixed and permanent bridges, or swing, draw or movable bridges, or to substitute any of such bridges for bridges existing on the line of its railway, within such time as the Governor in Council directs.

Consent of
Governor in
Council.

(2) No company shall substitute any swing, draw or movable bridge for any fixed or permanent bridge already built and constructed without the previous consent of the Governor in Council. R.S., c. 37, s. 234.

Former section 234.

This section reproduces section 183 in the Act of 1903, omitting the provision for a penalty of \$200 for every day after the period fixed by the Governor-in-Council during which default is made, for which now see secs. 444 and 445.

This section has been amended, not only by substituting the word "Board" for the words "Railway Committee," but also by requiring that the substitution of a swing, draw or movable bridge for a fixed or permanent bridge must first receive the consent of the Governor-in-Council. It was formerly sufficient to obtain the consent of the Railway Committee.

Headway
over cars.

250. (1) Every bridge, tunnel, or other erection or structure, over, through or under which any railway passes, shall be so constructed and maintained as to afford, at all times, an open and clear headway of at least seven feet between the top of the highest freight car used

on the railway and the lowest beams, members, or portions of that part of such bridge, tunnel, erection or structure, which is directly over the space liable to be traversed by such car in passing thereunder.

(2) The Board may, if necessary, require any existing bridge, tunnel, or other erection or structure to be reconstructed or altered, within such time as it may order, so as to comply with the requirements mentioned in the last preceding subsection; and any such bridge, tunnel, or other erection or structure, when so reconstructed or altered shall thereafter be maintained accordingly.

Powers of Board to order alteration.

(3) Except by leave of the Board the space between the rail level and such beams, members or portions of any such structure, constructed after the first day of February, one thousand nine hundred and four, shall in no case be less than twenty-two feet six inches.

Space above rail.

(4) If, in any case, it is necessary to raise, reconstruct or alter any bridge, tunnel, erection or structure not owned by the company, the Board, upon application of the company, and upon notice to all parties interested, or without any application, may make such order, allowing or requiring such raising, reconstruction or alteration, and upon such terms and conditions as to the Board shall appear just and proper and in the public interest.

Structures not owned by company.

(5) The Board may exempt from the operation of this section any bridge, tunnel, erection or structure, over, through or under which it is satisfied no trains, except such as are equipped with air brakes, are run. R.S., c. 37, s. 256. Am.

Board may exempt certain structures.

Former section 256 amended in sub-sec. 5 by adding the words "it is satisfied" in line 3 before "no trains." Section 402 provides a penalty of \$50 for each offence in violation of the Act or of any order or regulation of the Board. Section 202 in The Railway Act, 1903, and section 192 of the Act of 1888 correspond to this section.

In *Deyo v. Kingston & Pembroke Ry. Co.*, 4 C.R.C. 42, 8 O.L.R. 588, it was decided upon the proper construction of section 192 of the Act of 1888, that a railway company, whether the owners or not of a bridge under which their freight cars pass, are prohibited from using

higher freight cars than such as admit an open and clear headway of seven feet as prescribed in that section, which substantially corresponds with the present section; the same question was discussed in **McLauchlin v. G.T.R.**, 12 O.R. 418, and **Gibson v. Midland Ry. Co.**, 2 O.R. 658, which are distinguished in the **Deyo** Case; see also **Atcheson v. G.T.R.**, 1 C.R.C. 490, 1 O.L.R. 168. In the **Deyo** case, *supra*, these cases are examined and the corresponding section 192 of the Act of 1903 is expounded at p. 50.

If after a company has built a bridge of sufficient legal height over a highway that height is diminished owing to the failure of the municipality to keep the roadway at its former level, the railway company is not liable: **Carson v. Weston & G.T.R.**, 1 C.R.C. 487, and a company has no right to raise a municipal bridge passing over a railway without obtaining the consent of the municipality or the owner of the bridge, and if they do so they are liable to the adjoining proprietor for any damages sustained by reason of the increased height of the highway as it approaches the bridge: **Hill v. G.T.R.**, 12 L.N. 57.

Maintenance of Bridges. A railway company is bound to keep in repair and to maintain fences upon any bridge which it erects in accordance with the duty imposed upon it by statute: **VanAllen v. G.T.R.**, 29 U.C.R. 436.

It was decided in **Peterborough v. G.T.R.**, 1 C.R.C. 494-7, 32 O.R. 154, 1 O.L.R. 144, that where a railway company desiring to cross a highway at a point where it was carried by a bridge over a small stream, diverted the stream under its statutory powers to a point some distance away and built a new bridge over it where it there intersected the highway, it was under no liability in the absence of special agreement to keep the bridge substituted by it in repair.

As to whether a railway company is required to maintain and repair approaches to such a bridge see notes to sections 264 and 266, *infra*. A railway company is liable for all damages suffered on account of the non-repair of a bridge which it is required to maintain: **Zimmer v. G.T.R.**, 21 O.R. 628, 19 A.R. 693, and is bound to provide against all dangers to a bridge that could reasonably have been foreseen, and if a bridge were so constructed that it could be destroyed by a storm such as might reasonably have been anticipated the railway company is liable: **Carney v. Caraqueet Ry. Co.**, 29 N.B.R. 425. But if a bridge is destroyed by some force of nature that could

not have been foreseen the company would not be liable: **Ibid.**

Width of Bridge. A company connected a roadway 66 feet wide across part of their track with a bridge 40 feet 2 inches wide, and it was held that a jury might properly find that this was a sufficient compliance with the Act and that the company had not necessarily committed a nuisance: **Regina v. Great Western Ry. Co.**, 12 U.C.R. 250; but see cases *infra*, decided by the Board.

Bridge over Navigable Waters. Unless an individual can show that he has sustained some injury peculiar to himself he cannot recover damages for an obstruction to navigation owing to a bridge being improperly built. The proper remedy for such an obstruction is by indictment: **Small v. G.T.R.**, 15 U.C.R. 283; **Cull v. G.T.R.**, 10 Gr. 491. See also **G.T.P. Ry. Co. v. British Columbia Express Co.**, 55 S.C.R. 328.

The Board has decided that a railway company in crossing a highway by making a cutting in a road which it replaces by a bridge, is bound at its own expense to make the substituted bridge as strong as the earth formerly composing the roadway which it cut away and of the full width of the original highway, if necessary to accommodate public traffic, and of such strength as the present day traffic requires, the surface paving if different from that of the original roadway to be supplied by the municipality. (**King Street Bridge Case**) **City of Hamilton v. C.P.R. and T.H. & B. Ry. Cos.**, 25 C.R.C. 379. **Main Street Bridge Case**, East Toronto, **City of Toronto v. G.T.R.**, *ibid*, 344; see also **City of Windsor v. C.P.R.**, 21 C.R.C. 66.

Where a company has impeded navigation it is no defence to say that it impeded it as little as possible and for only a short time: **Snure v. Great Western Ry. Co.**, 13 U.C.R. 376. Where a company controlling a swing bridge over a canal was not able to open it as plaintiff's vessel was approaching, although notice was given of its approach by blowing a horn and hailing, the company was held not liable for injuries received by the vessel: **Turner v. Great Western Ry. Co.**, 6 U.C.C.P. 536.

Bridges over Highways. Where a company in crossing a highway had to make a cutting in a road to be afterwards supplemented by a bridge which could not be erected until the cutting was completed it was held that as it had carried on the work diligently and that as before the trial the bridge had been completed, the plaintiff, a

private individual, could not recover because the defendants had not under the circumstances been guilty of any wrong, and the delay, even if improper, should have been the subject of an indictment, and not of a private action: **Ward v. Great Western Ry. Co.**, 13 U.C.R. 315. But where a railway company neglected to make a proper bridge over the railway where it crossed a highway owned by a Toll Road Company, the latter were permitted to recover for this neglect: **Streetsville Plank Road Co. v. Hamilton, etc., Ry. Co.**, 13 U.C.R. 600. Where a company erected a bridge over a highway, thereby partially destroying and obstructing the plaintiff's access to it, but leaving him room to reach it at one end of the bridge, it was held that there was no right of action for the defendants' charter bound them to do the act complained of and made no provision for compensation: **MacDonell v. Ontario, etc., Ry. Co.**, 11 U.C.R. 271.

See **Assiniboia v. C.N.R.**, 14 C.R.C. 365, as to liability for maintenance, and **Lachine v. G.T.R.**, 20 C.R.C. 82, as to lighting.

The Board has jurisdiction over all clearances on Dominion railways. **H. E. Power Commission v. London & P.S. Ry. Co.**, 17 C.R.C. 326.

Where
length ex-
ceeds 18 feet.

Leave or
approval of
Board.

251. (1) The company shall not, within the limits of any incorporated city or town, or where its line of railway crosses a highway, whether within or without such limits, commence the construction or reconstruction of, or any material alteration in any bridge, tunnel, viaduct, trestle, or other structure, through, over, or under which the company's trains are to pass, the span, or proposed span or spans, or length of which exceeds eighteen feet, until leave therefor has been obtained from the Board; but the company may, without such leave, commence such construction, reconstruction or alteration at any place beyond the said limits, if such construction, reconstruction or alteration is not at a highway crossing and is in accordance with standard specifications and plans approved by the Board.

Application
for leave.

(2) Upon any application to the Board for such leave, the company shall submit to the Board the detail plans, profiles, drawings and specifications of any such work proposed to be constructed, and such other plans, profiles,

drawings and specifications as the Board may in any case, or by regulation, require.

(3) Upon any such application the Board may,—

- | | | |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| (a) | make such order with regard to the construction of such work, and upon such terms and conditions, as it deems expedient; | Powers of Board.
Terms. |
| (b) | make alterations in the detail plans, profiles, drawings and specifications so submitted; | Alterations. |
| (c) | give directions respecting the supervision of any such work; and, | Supervision. |
| (d) | require that such other works, structures, equipment, appliances and materials be provided, constructed, maintained, used, and operated, and that such measures be taken, as, under the circumstances of each case, may appear to the Board best adapted for securing the protection, safety and convenience of the public. | Other works. |

(4) Upon such order being granted the company shall be authorised to construct such works in accordance therewith.

Company may construct.

(5) Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorising such use or operation, and the Board may grant such order if it is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with. R.S., c. 37, s. 257.

Board to authorise operation.

(6) Upon the application of any municipality or municipalities interested, the Board may, where it deems it reasonable and proper, require the company to construct under or along-side of its track upon any bridge being constructed, reconstructed or materially altered by the company a passage-way for the use of the public either as a general highway or as a foot-way, the additional cost to the company of constructing, maintaining and renewing which, as fixed by or under the direction

Passage-way for public.

of the Board, shall be paid by the municipality or municipalities as the Board may direct, and the Board may impose any terms or conditions as to the use of such passage-way or otherwise which it deems proper. **New.**

Former section 257, with sub-section 6 added, and sub-section 1 amended by providing that leave of the Board must be obtained within the limits of municipalities. In a case where a roadway was erected on each side of the track as part of a railway bridge over a river, the Board refused an application that the company should provide gates and watchmen at both ends of the bridge to warn the public against approaching trains, the necessity for such protection being held to be incidental to the use of the bridge as a highway. **Buckland v. C.N.R.**, 23 C.R. C. 13.

Crossings and Junctions With Other Railways.

Leave of
Board.

252. (1) The railway lines or tracks of any railway company shall not cross or join or be crossed or joined by or with any railway lines or tracks other than those of such company, whether otherwise within the legislative authority of the Parliament of Canada or not, until leave therefor has been obtained from the Board as hereinafter provided.

Plans, etc.,
to be sub-
mitted.

(2) Upon any application for such leave the applicant shall submit to the Board a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Board may, in any case, or by regulation, require.

Powers of v
Board.

(3) The Board may, by order,—

- (a) grant such application on such terms as to protection and safety as it deems expedient;
- (b) change the plan and profile, drawings and specifications so submitted, and fix the place and mode of crossing or junction;
- (c) direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks;
- (d) direct that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated,

watchmen or other persons employed, and measures taken, as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage;

- (e) determine the amount of damage and compensation, if any, to be paid for any property or land taken or injuriously affected by reason of the construction of such works;
- (f) give directions as to supervision of the construction of the works; and
- (g) require that detail plans, drawings and specifications of any works, structures, equipment or appliances required, shall, before construction, or installation, be submitted to and approved by the Board.

(4) No trains shall be operated on the lines or tracks of the applicant over, upon or through such crossing or junction until the Board grants an order authorising such operation.

No operation until authorised.

(5) The Board shall not grant such last mentioned order until satisfied that its orders and directions have been carried out, and that the provisions of this section have been complied with. R.S., c. 37, s. 227.

Board shall see to compliance.

Compare 8 Vic., cap. 20, sec. 16 (Imp.). The general power to cross or join other railways is given by section 162, former sec. 151 (e), and sec. 177 (1903). The former provisions are to be found in sections 173 to 177 in the Act of 1888, as amended by 56 Vic., cap. 27, 55 Vic., cap. 27, sec. 5, and 58 Vic., cap. 27, sec. 1. See remarks of Killam, Chief Comm. in **Preston & Berlin Street Ry. Co. v. G.T.R.**, 6 C.R.C. 142. The provision in sub-section 3 (c) as to one line of track being carried over another line, may have been suggested by the decision in **James Bay R.W. Co. v G.T.R.**, 37 S.C.R. 372; 5 C.R.C. 164.

This is one of the sections which by section 8 *ante*, applies to steam, electric or street railways which are seeking to cross a railway already located and for the purpose of deciding upon the desirability of effecting a

crossing they are all to be deemed works for the general advantage of Canada. In **G.T.R. v. Hamilton, etc., Ry. Co.**, 29 O.R. 143, it was held that the corresponding provisions of the earlier Act were *intra vires* of the Dominion Parliament and that a crossing might be made at rail level where permitted by the Railway Committee, although such crossings were expressly forbidden in the Ontario Statute incorporating the company which desired to cross. In the earliest Canadian Railway Act, 14 & 15 Vict., cap. 51, sec. 9, the provision for crossing required the appointment of an arbitrator to determine the place and manner of crossing and the compensation to be paid, and such cases as **Buffalo, etc., Ry. Co. v. Great Western Ry. Co.**, 2 P.R. 88, and 14 U.C.R. 397, were decided upon that section, but the present enactment leaves all these matters to the Board and prescribes the terms upon which a crossing is to be made.

Approval and Jurisdiction of the Board. The provisions requiring the approval of the proper authority are passed in the interests of the public and such approval cannot be waived by agreement between the companies. It is also a condition precedent to the exercise of the right of crossing and any attempt to cross before such approval has been obtained will be restrained by injunction: **Credit Valley Ry. Co. v. Great Western Ry. Co.**, 25 Gr. 507. For the principles upon which the court will grant an interim injunction see **G.T.R. v. Credit Valley Ry. Co.**, 26 Gr. 572. Nor will the authority of a provincial legislature to cross a Dominion railway take the place of an order of the Board: **C.P.R. v. Northern, etc., Ry. Co.**, 5 Man. L.R. 301; and this order should not only be applied for, but obtained before the work is begun: *ibid.* The order of the Board allowing a crossing will not confer power upon a company to take private lands or a portion of a highway for the purpose of laying such tracks as are required unless the other steps required for the expropriation of lands or the use of a part of the highway are also taken: **City of Toronto v. Metropolitan Ry. Co.**, 1 C.R.C. 63.

The order of the Board must accurately describe the lands over which the crossing is to be made, and if the lands are mis-described the crossing company will be enjoined from proceeding with the intersection, provided for by the order: **G.T.R. v. Lindsay, Bobcaygeon & Pontypool Ry. Co.**, 3 C.R.C. 174.

Sub-section 3 provides in detail for the nature of the supervision which the Board is to exercise and provides

also for payment of compensation for lands taken or injuriously affected or damage done by reason of the construction of the crossing. The principles upon which compensation should be allowed were discussed in argument in **Re Credit Valley and Great Western Ry. Cos.**, 4 A.R. 532, but were not laid down in the judgment. It will be noted that this section does not deal with the actual taking of the land required for the crossing, but only with the place and mode thereof. The power to take the land of another railway company for the purpose of making a crossing is given by section 193, *ante*. Before any crossing could be made the provisions of this latter section would also have to be complied with: **G.T.R. v. Lindsay, etc., Ry. Co.**, *supra*.

The settled practice of the former Railway Committee and of the Board has been not to allow any damages or compensation for lands taken or injuriously affected by the construction of a crossing or junction under this section or for interference with the business of the senior company. It has been the settled practice that the junior company applying to make a crossing or junction with the line of a senior company should bear the expense of the construction, operation and maintenance of the protective appliances required by the Board or Committee to be provided at such crossing or junction: **Merritton Crossing Case**, 3 C.R.C. 263; **Guelph & Goderich Ry. Co. v. Guelph Radial R.W. Co.**, 5 C.R.C. 180. The same rule applies in the case of additional tracks laid from time to time by the senior company. **St. Hyacinthe Crossing Case**, 7 C.R.C. 294.

The railway in actual occupation of the ground with or without actual ownership of the fee at the point of crossing has priority over a railway which has prior sanction of its location plan and is the senior company. **Kaiser and Nokomis Crossing Cases**, 7 C.R.C. 297 and 299. It is construction, not ownership or prior location, which gives seniority at the point of crossing. These decisions have been followed in a number of subsequent cases. **C.N.R. v. C.P.R.**, 11 C.R.C. 432; **Midland Ry. Co. v. G.T.P. Ry. Co (St Boniface Crossing Case)**, 23 *ibid*, 80; **Erie & Ontario Ry Co. v. N. St. C. and T. Ry. Co.**, 18 *ibid*. 29.

Where a city street is senior to the tracks of a steam railway crossing it, the tracks of a municipally owned street railway which are subsequently laid across the steam railway tracks are not junior thereto so as to require the whole cost of the construction and maintenance

of the crossing and its protection to be borne by the city, but it will be divided equally between them. **Edmonton Street Ry. Co. v. G.T.P. Ry. Co.**, 14 *ibid.* 93, affirmed by the Supreme Court of Canada, 15 C.R.C. 445.

As seniority does not depend upon ownership of the land on which the railway is built but rests upon construction, a steam railway does not lose its seniority at a crossing on the highway of an electric street railway when the electric railway is acquired by the municipality. **G.T.R. v. Kitchener & Waterloo Street Ry. Co.**, 24 C.R.C. 13. The traffic of a steam railway has priority at the crossing of an electric railway on the highway, even though the steam railway is junior and has to pay the cost of construction and maintenance of the crossing, the electric railway is treated as an ordinary highway occupant. **Lake Erie & Northern Ry. Co. v. Brantford Street Ry. Co.**, 16 C.R.C. 244. According to the practice of the Board the junior company permitted to cross with its line the tracks of the senior, bears all the expense and responsibility of such crossing. **Winnipeg Electric Ry. Co. v. C.P.R.**, 18 C.R.C. 36, but see **Pattison v. C.P.R.**, 14 C.R.C. 401, and 405, 24 O.L.R. 482, 26 O.L.R. 410, where it was held by the Court of Appeal, and affirmed by the Supreme Court of Canada that the senior company appointing the signalman in charge of the crossing is liable to a servant of the other (junior) company injured by the negligence of the signalman in passing a train over the crossing.

The practice of the Board in the application of the senior and junior rule at crossings of railways and highways is discussed in the notes to **City of Edmonton v. Calgary & Edmonton Ry. Co.**, 22 C.R.C. at p. 188, where the relevant decisions are collected.

The Board has jurisdiction to compel a provincial railway company in the public interest to cross a Dominion railway by a double instead of a single track. **City of London v. London S. Ry. Co.**, 19 C.R.C. 436.

Under an agreement by one company to maintain at its own expense an overhead bridge of another company in a good and safe state so as not to endanger the property fixed or movable of the other and to indemnify it from damage due to construction or non-maintenance of the crossing, it was held that the obligation was to provide at all times a structure sufficient for conditions of modern traffic and was not limited to maintaining the structure in its original condition. **G.T.R. v. C.P.R. (Myrtle Bridge Case)**, 15 C.R.C. 433, affirmed by the Supreme Court of Canada, 17 C.R.C. 300, 49 S.C.R. 525.

“Cross” in this section means to pass the tracks of one railway on, over or under the tracks of another by meeting at any angle continuing at the same angle to the opposite side of the track crossed and immediately leaving the track crossed. “Join” in this section means to join on the same level so as to enable the transfer of cars. **Canadian N.W. Ry. Co. v. C.P.R.**, 16 C.R.C. 105.

A railway company was held not entitled to contribution from another railway (seeking to cross it) towards the cost of works already constructed by the first railway of which the second availed itself in making the crossing. **C.L.O. & W. Ry. Co. v. C.N.O. Ry. Co.**, 14 C.R.C. 220.

Where senior track was not authorised and both parties acted irregularly the Board made an order authorising construction of the senior track subject to the right of the junior track to cross it and gave special directions as to cost. **C.P.R. v. Winnipeg Electric Ry. Co.**, 18 C.R.C. 31.

253. (1) Where the lines or tracks of one railway are intersected or crossed by those of another, or upon any application for leave to make any intersection or crossing, or in any case in which the tracks or lines of two different railways run through or into the same city, town or village, the Board may, upon the application of one of the companies, or of a municipal corporation or other public body, or of any person or persons interested, order that the lines or tracks of such railways shall be so connected, at or near the point of intersection or crossing or in or near such city, town or village, as to admit of the safe and convenient transfer or passing of engines, cars and trains, from the tracks or lines of one railway to those of another, and that such connection shall be maintained and used.

Connections of intersecting railway lines.

(2) In and by the order for such connection, or from time to time subsequently, the Board may determine by what company or companies, or other corporations or persons, and in what proportions, the cost of making and maintaining any such connections shall be borne, and upon what terms traffic shall be thereby transferred from the lines of one railway to those of another.

Costs and terms of connections.

(3) Where the lines or tracks of any railway within the legislative authority of a province intersect the lines

Connections
between
intersecting
provincial
and
Dominion
railways.

or tracks, or run through or into the same city, town or village as the lines or tracks, of a railway within the legislative authority of the Parliament of Canada, and it is desired by the company owning or operating either of such railways, or by any municipal corporation, or other public body, or any person interested, that the lines or tracks of such railways should be connected, so as to admit of the safe and convenient transfer of engines, cars and trains from the lines or tracks of one of such railways to those of the other, and for the reasonable receiving, forwarding, delivering and interswitching of traffic between such railways, and there exists in the province in which such connection is desired a provincial railway, public utilities, or other board, commission or body, having power to require such connection between two railways within the legislative authority of such province, hereinafter in this sub-section called the provincial board, proceedings may be taken in accordance with the following provisions:—

Proceedings.

Application
for order.

(a) Either of such companies, or any municipal corporation, or other public body, or any person interested, may file with the Secretary of the Board, and with the secretary of the provincial board, an application for an order that such connection should be required to be made, together with evidence of service of such application upon the railway companies interested or affected; and, where the application is not made by the municipality, upon the head of the municipal corporation within which the proposed connection is situate;

Hearing of
application
by Board
and
provincial
authorities.

(b) After the receipt of the said application, the Board and the provincial board may, by joint session or conference, in conformity with the practice established or adopted by them, hear and determine the said application, and may order that the lines or tracks of such railways be so connected at or near the point of intersection, or in or near such city, town, or village, upon such terms and conditions, and subject to

such plans, as they may deem proper;

- (c) The Chief Commissioner and the chairman of the provincial board of any province having concurrent legislation carrying into effect the purposes and objects of this sub-section, may make rules of procedure and practice covering the making of such applications and the hearing and the disposition thereof; Rules of procedure.
- (d) The Chief Commissioner and the chairman of the provincial board may assign or appoint from each board the members comprising the joint board that may be required to sit for the hearing and determining of such applications as they arise; Constitution of joint boards.
- (e) Any order aforesaid may be made a rule of the Exchequer Court and shall be enforced in like manner as any rule, order, or decree of such court. R.S., c. 37, s. 228; 1911, c. 22, s. 5. Am. Enforcement of order.

Former section 228 amended 1911 by adding sub-section 3. See Section 313. Sub-sections 1 and 2 were originally enacted by 6 Edw. VII., ch. 42, sec. 15 (5), pending an unsuccessful appeal (11th December, 1906), to the Supreme Court of Canada from the Order in the **London Interswitching Case**, 6 C.R.C. 327 at p. 340.

Interswitching facilities were at first confined to industrial or business spurs or sidings but did not extend to team tracks in railway terminals. To provide a tariff basis for such services which are distinct from the line haul, the Board on 8th July, 1908, issued the General Interswitching Order No. 11, printed in full in 7 C.R.C. 302. This is not a mandatory order requiring interswitching facilities to be given wherever possible; it is a regulative order merely, and fixes the tolls to be charged when the service is rendered, 19 C.R.C. 376. By later General Orders the service was extended to team tracks as of right, 24 C.R.C. 324.

No carrier, however, is entitled to demand access to the tracks of another carrier by means of interswitching or to the use of its facilities upon payment of the prescribed charges; the public interest, economy of movement and convenience to shippers must first be shewn. **C.N.O.R. v. C.P.R.**, 20 *ibid.* 200. Speaking generally

where the effect of granting an application for an interchange track will be to divert the traffic from the older line, the whole cost of its construction and maintenance will be borne by the junior company or industry making the application. Interswitching facilities are not granted to benefit one railway at the expense of another, but solely in the public interest. **Calgary Interswitching Case**, 21 *ibid.* 187; **Gillies v. G.T.R. and C.P.R.**, 18 *ibid.* 44. The carrier upon whose line or siding the traffic is loaded is entitled when an interchange track is built to the line haul and the privilege of making delivery at destination, provided its facilities are equal to those of its competitor and at no greater cost. **Re Belleville Interchange Track**, 23 *ibid.* 22.

A municipality applying for an interchange track will not be ordered to bear any part of the cost of its construction or maintenance as "interested or affected" within the meaning of sec. 39 (former 59); **Thorold v. G.T.R. and Niagara, etc., Ry. Co.**, 24 *ibid.* 21. It is the duty of railway companies, within reason, to furnish interswitching facilities to shippers requiring them at the intersection of their lines. **Brampton v. G.T.R. and C.P.R.**, 10 *ibid.*, 173.

The terms of the general Interswitching Order do not apply to a special agreement providing for the cost of the service in a particular locality. **Fergus v. G.T.R.**, 18 *ibid.* 42, distinguished in **C.P.R. and Spanish River P. & P. Mills v. Algoma Eastern Ry. Co.**, 22 *ibid.* 381, where the tolls provided in an agreement made in 1901 were found unremunerative and the terms of the General Order were substituted. In **Cumberland Board of Trade v. E. & N. Ry. Co.**, 18 C.R.C. 48, the Board made an order in the public interest for an interchange track to transfer passengers and freight to be built by a Dominion Railway Company connecting its line with that of a Provincial railway company upon condition that the provincial company contribute one third of the cost.

Safety appliances at rail level crossings.

254. The Board may order the adoption and use at any such crossing or junction, at rail level, of such interlocking switch, derailing device, signal system, equipment, appliances and materials, as in the opinion of the Board renders it safe for engines and trains to pass over such crossing or junction without being brought to a stop. R.S., c. 37, s. 229.

The junior company usually bears all the expense of protective appliances: **Lennoxville Crossing Case**, 6 C.R. C. 77; **Winnipeg Electric Ry. Co. v. C.P.R.**, 18 C.R.C. 36.

The Board has decided that at all crossings where interlocking appliances have been ordered since 1st October, 1908, the signalman in charge at such crossing should be regarded as the joint employee of both railway companies, selected by the senior company and liable to dismissal for cause upon complaint or objection by the junior company, that each company should bear and be liable for all the loss or damage suffered or sustained on its own lines by its patrons or employees or to its property by the negligence of the joint signalman. **Re Interlockers**, March 30th, 1909. 4th Annual Report, p. 304.

Highway Crossings, etc.

255. (1) The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorised, but shall not without such leave, be carried upon, along or across any existing highway: Provided that the company shall make compensation to adjacent or abutting land-owners if the Board so directs, said compensation to be determined under the arbitration sections of this Act, in so far as such sections are applicable, and provided that the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained consent therefor by a by-law of the municipal authority of such city or incorporated town; and provided that where leave is obtained to carry any railway along a highway the Board may require the company to make compensation to the municipality if the Board deems proper, said compensation to be determined under the arbitration sections of this Act, in so far as such sections are applicable.

Railway on highway.

Leave.

Compensation.

Consent of municipality.

Former section 235, as amended by 1-2 Geo. V., cap. 22, sec. 6, following the decision in **G.T.P. v. Ft. William Landowners**, 13 C.R.C. 187, and further amended in this revision. Before the Act of 1911, no compensation was payable to adjacent or abutting landowners, none of

whose lands were taken, but who suffered damage by reason of the construction of a railway upon or across a highway. The Act of 1-2 Geo. V. provided that “**subject** to the company making such compensation to adjacent or abutting owners as the Board deems proper the railway of the company may be carried,” etc. Compensation under this amendment was held to be a matter for the Board and was not to be fixed by arbitration: **C.N.O. Ry. Co. v. Holditch**, 50 S.C.R. 265, 19 C.R.C. 112, 20 D.L.R. 557 (over-ruling **C.N.O. Ry. Co. v. North Bay**, 18 C.R.C. 309); **Brant v. C.P.R.**, 36 O.L.R. 619, 20 C.R.C. 268; **North Bay Landowners v. C.N.O. Ry. Co.**, 23 C.R.C. 35. But the present section provides for compensation only in such cases as the Board directs, and expressly provides that it shall be determined by arbitration. The Board has decided that it has power to make compensation to adjoining owners a condition of the order. **Hamilton v. G.T.R.**, 14 C.R.C. 196, but **quaere**, whether such jurisdiction exists once a railway is in operation; see the annotation at 14 C.R.C. 199.

The section as amended does not make the payment or tender of the amount of damages the land would suffer by the building of the railway a condition precedent to the building of such railway. No damages can be recovered in the Courts if the Board has not directed them to be paid, and there is no obligation on the railway company to apply to the Board to decide if they are payable, or to fix the amount of them. **Hornstein v. C.N.R.**, 23 C.R.C. 424, 44 D.L.R. 511. The point was raised in this case whether damages could be awarded under this section for operation as well as construction. That point was not necessary for the decision of the case, but it is submitted that if no land is taken, no damages for smoke, noise or vibration could be awarded. See notes to section 221.

Prior to the Act of 1903 the consent of a municipality was not required in any case, but now in cases of railways designed to operate on streets such consent must be obtained and this consent must be by by-law. In **Liverpool v. Liverpool, etc., Ry. Co.**, 35 N.S.R. 233, reversed in the Supreme Court 3 Can. Ry. Cas. 80, it was held under a somewhat similar section that a mere resolution of council would not take the place of a by-law under seal, and though by section 2 (b) the word “by-law” includes a resolution, this is expressly limited to by-laws of the company. Under former statutes it had been decided that a by-law was not necessary: **Pembroke v. Canada Central Ry. Co.**, 3 O.R. 503; and in **Lett v. St. Lawrence**,

etc., *Ry. Co.*, 1 O.R. 545, Hagarty, C.J., thought that acquiescence in a track placed upon a highway might be assumed from the length of time during which it had existed, but Armour, J., considered that if illegally laid down no acquiescence except by by-law could make it rightful as against a person injured.

And where a municipality agreed with a railway company to close certain streets, but did not pass the necessary by-laws, and the company constructed its railway and obstructed the streets, the company was held liable in damages as a trespasser, and was restrained by injunction: *Holmsted v. City of Moose Jaw and C.N.R.*, 22 C.R.C. 169, 29 D.L.R. 761, 9 Sask. L.R. 327; but the municipality was held not liable to the landowners, 22 C.R.C. 177, 36 D.L.R. 747. The provision for compensation to the municipality is new. "Highways" are defined by section 2 (11), *supra*, and under *Gloucester v. Canada Atlantic Ry. Co.*, 1 C.R.C. 327, 334, this definition was held to include an unopened road allowance. This and succeeding sections should also be read with section 162, sub-sections (k) and (l), *supra*, which confer power upon a railway company to construct its works upon, across and over any highway, etc., or to temporarily or permanently divert it.

And see *Hamilton v. Hamilton, etc., Ry. Co.*, 22 C.R.C. 438. In the absence of evidence of dedication of a highway, acceptance by the municipality, or recognition by the railway company, the cost of a crossing must be borne by the municipality: *G.T.R. v. Hamilton*, 22 C.R.C. 442, following *Weston v. C.P.R. & G.T.R.*, 7 C.R.C. 79, *St. Pierre v. G.T.R.*, 13 C.R.C. 1; *Montreal v. C.P.R.*, 18 C.R.C. 50; *Lachine v. G.T.R.*, 18 C.R.C. 385.

Constitutionality. The soil in highways in Canada is generally vested in the Crown and this means in the Province (unless the soil of the highways is by Provincial Statute vested in the municipality as in Ontario, by R.S. O., cap. 192, sec. 433), in which also resides the general power of legislation respecting them under sub-sections 8 and 10 of section 91 of the B.N.A. Act: *Re Trent Valley Canal*, 11 O.R. 687, at p. 696, and the power to regulate highways and the possession of them are generally vested by the provincial legislatures in the municipalities; but even the Crown could not without legislative sanction, stop up, obstruct or permit a nuisance upon a highway: *Reg. v. Hunt*, 16 U.C.C.P. 145, 17 U.C.C.P. 443; *Nash v. Glover*, 24 Gr. 219; nor can a municipality by virtue of its ordinary powers confer a franchise or right to make

an onerous use of the highway upon individuals or a corporation: **Re Toronto and Toronto Street Ry. Co.**, 22 O.R. 374, at p. 396; **Davis v. New York**, 14 N.Y. 506; or authorise or itself create a nuisance upon it unless the legislature has expressly conferred such a power: **Cline v. Cornwall**, 21 Gr. 129; **Re Toronto and Toronto Street Ry. Co.**, *supra*. As railways on highways have been held to be a nuisance and subject to indictment unless parliamentary sanction has been obtained (**Reg. v. Charlesworth**, 16 Q.B. 1012, **Reg. v. Longton Gas Co.**, 2 E. & E. 651; **Sadler v. South Staffordshire, etc., Ry. Co.**, 23 Q.B. D. 17; **Magee v. London, etc., Ry. Co.**, 6 Gr. 170; **Robertson v. Halifax Coal Co.**, 20 N.S.R. 517), it follows that there must be some power in the Dominion Parliament to authorise the partial occupation of a highway by railways or otherwise such occupation would be illegal. This power is to be found in section 91, sub-section 10 of the B.N.A. Act, which empowers Parliament to legislate in respect of railways declared to be for the general advantage of Canada or of two or more provinces. Where this is the case Parliament has jurisdiction even over matters which otherwise would be subject only to provincial legislation: *Lefroy Legislative Power in Canada* 393; **Re C. P.R. and York**, 1 C.R.C. at p. 52; **G.T.R. v. Attorney-General** (1907) A.C. 65, at p. 68. 7 C.R.C. 472.

Where Parliament or a legislature having the necessary constitutional power, authorises an interference with the streets of a municipality, its right is supreme and the municipality cannot object even though there is no provision for supervision of the works by it and no provision for compensation: **Standard Light, etc., Co. v. Montreal**, Q.R. 10 S.C. 209, 5 Q.B. 558; **Cleveland v. Melbourne**, 26 L.C. Jr. 1; **Bell v. Westmount**, Q.R. 15 S.C. 580; **Corporation of City of Toronto v. Bell Telephone Co.** (1905), A.C. 52, nor need it obtain the consent of other companies or individuals who may be affected or injured: **Bristol, etc., Co. v. National Telephone Co.** (1899), 2 Ch. 282.

Statutory Requirements. Until a railway company has fulfilled all statutory requirements, it cannot enter upon a highway or run its trains over it: **West v. Parkdale**, 7 O.R. 270, 8 O.R. 59, 12 A.R. 393, 12 S.C.R. 250; **Parkdale v. West**, 12 A.C. 602, **Pion v. North Shore Ry. Co.**, 14 A.C. 612; **Mitchell v. Sandwich, etc., Ry. Co.**, 19 C.R. C. 300, 22 D.L.R. 531, 32 O.L.R. 597; **Dominion Iron and Steel Co. v. Burt** (1917), A.C. 179, 20 C.R.C. 134, 33 D. L.R. 425; **Holmsted v. C.N.R.**, 19 C.R.C. 105, 22 D.L.R. 55, 9 Sask. L.R. 327, 22 C.R.C. 169, 29 D.L.R. 761, and

the fact that no appreciable injury will result is no excuse for non-compliance with this general rule: **Attorney-General v. London, etc., Ry. Co.** (1899) 1 Q.B. 72, (1900) 1 Q.B. 78; but when all preliminaries have been observed the company is not responsible for any damages to individuals which may result unless it appears from the terms of the Statute that compensation is to be paid: **Casgrain v. Atlantic, etc., Ry. Co.** (1895), A.C. 282. The following requirements are laid down in the Act:—

1. By section 163, **ante**, the company must restore the highway as nearly as possible to its former state or put it in such a state as not materially to impair its usefulness.

2. By section 164 it must do as little damage as possible and make full compensation “in the manner prescribed herein” for all damage.

3. By the present section it must obtain leave from the Board.

4. And, in cases where it is to operate as a street railway, of the municipality.

5. It must turn the highway during the works as provided by sub-section 2, **infra**.

6. The top of the rail must not be more than one inch above or below any highway which it crosses on the level; section 265.

7. Plans and profiles of the proposed crossing must be filed and approved by the Board; section 256.

8. Any highway crossed by an overhead track must comply with section 257.

9. Any highway carried over a railway must comply with section 264.

10. The slope of approaches to crossings must not exceed one foot in twenty without leave of the Board and must be fenced; section 266.

11. Signboards must be placed as prescribed by section 267.

12. Trains in approaching level crossings must ring a bell or sound a whistle at least 80 rods before reaching it; section 308.

13. Trains passing through thickly peopled portions of any city, town or village or over a crossing where an accident has happened subsequent to 1st January, 1905, must not exceed ten miles an hour unless the track is fenced in the manner prescribed by the Act or an order of the Board for protection has been complied with; section 309.

14. Trains moving reversely over a highway in cities, towns or villages must have a person stationed at the foremost part of the train; section 310.

15. Trains must not stand on crossings more than five minutes without being cut; section 311.

16. Compensation to landowners if the Board so directs, sec. 255.

17. If the railway is to be carried along a highway, compensation to the municipality if the Board so directs. Sec. 255.

Supervision. It should be noted that where work is to be done on highways subject to the supervision of some municipal officer the latter cannot by his approval waive compliance with statutory requirements: **Joyce v. Halifax Street Ry. Co.**, 24 N.S.R. 113, 22 S.C.R. 258; **Bonn v. Bell Telephone Co.**, 20 O.R. 696.

Compensation. As the soil and freehold in highways are vested in the Crown in the right of the province (**Re Trent Valley Canal**, 11 O.R. 687, at p. 696) a municipality would have no right to compensation for the value of the land occupied by a railway company: **Canada Atlantic Ry. Co. v. Ottawa**, 1 C.R.C. 298, 305; unless the soil and freehold of the highways is vested in the municipality by statute; and though they may have a property in the materials composing the roadway they cannot in the absence of express enactment claim payment for such as have been interfered with or actually removed: **Sidney v. Young** (1898) A.C. 457, nor can they claim to be indemnified because the railway works render it more difficult to reach a sewer that may have been beneath them: **Birkenhead v. London, etc., Ry. Co.**, 15 Q.B.D. 572; since the amendment of this section, however, the Board may direct the company to make compensation to a municipality where leave is obtained to carry any railway along a highway within the jurisdiction of the municipality; where, however, a railway company without lawful authority removes gravel from a road allowance it may be sued for the trespass committed: **Brock v. Toronto, etc., Ry. Co.**, 37 U.C.R. 372. Cited in **Louise v. C.P.R.**, 3 C.R. C. 65. For a discussion of the subject of compensation to individuals see notes to section 256, sub-section 3, *infra*.

Who May Sue or Indict—Attorney-General. Where a company is proceeding to cross a highway without lawful authority the Attorney-General acting on behalf of the public is the proper person to take action to restrain

the nuisance thereby created: **Attorney-General v. London, etc., Ry. Co.** (1899), 1 Q.B. 72 (1900), 1 Q.B. 78; **Regina v. G.T.R.**, 15 U.C.R. 121; **Joyce v. Halifax Street Ry. Co.**, 24 N.S.R. 113; **Attorney-General v. Toronto Street Ry. Co.**, 14 Gr. 673.

The Municipality. A municipality by virtue of its control of streets has apparently a general right to restrain any company illegally seeking to occupy them: **Joyce v. Halifax Street Ry. Co.**, *supra*, and would also be entitled to a declaration as to whether that company had any right to obstruct or occupy them: **Gooderham v. Toronto**, 21 O.R. 120, 19 A.R. 641; **Toronto v. Lorsch**, 24 O.R. 227; **Gloucester v. Canada Atlantic Ry. Co.**, 1 C.R.C. 327, 334, and this is especially the case where the railway has entered into an agreement with a municipality which has been confirmed by statute, as to the manner in which the streets shall be occupied. In fact in such a case it has been held that though an information by the Attorney-General to enforce the statutory restrictions was proper, yet the municipality was a necessary party: **Attorney-General v. Toronto Street Ry. Co.**, 14 Gr. 673, and see 15 Gr. 187. In **Fenelon Falls v. Victoria Ry. Co.**, 29 Gr. 4, it was laid down that by virtue of the Municipal Act there is such power of management control, etc., bestowed upon municipalities and such a responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights.

Individuals. The right of individuals to recover damages or compensation is dealt with under section 256 (3), *infra*. It will be sufficient here to say that an individual may apply for an injunction for failure to comply with statutory requirements where he can show an injury peculiar to himself: **Hendrie v. Toronto, etc., Ry. Co.**, 26 O.R. 667, 27 O.R. 46, or he may recover damages for injuries so sustained: **Sibbald v. G.T.R.**, 19 O.R. 164, 18 A.R. 184, 20 S.C.R. 259; **West v. Parkdale**, *supra*; **Brodeur v. Roxton Falls**, 11 R.L. 447; **Whitefield v. Atlantic, etc., Ry. Co.**, 33 L.C.J. 24. **Mitchell v. Sandwich, etc., Ry. Co.**, **Dominion Iron and Steel Co. v. Burt**, **Holmsted v. C.N.R.**, *supra*.

Opening Highways Across Railways. If a railway has constructed its line across an unopened road allowance the municipality can compel it to remove its fence so that the road may be opened up; and it is not necessary that a by-law to do this should be passed; a mere direction to the proper officer to open the road will suffice: **Gloucester v. Canada Atlantic Ry. Co.**, 1 C.R.C.

327, 334, but in **St. Liboire v. G.T.R.**, 16 L.C.R. 198, 1 L.C.L.J. 54, it was decided that a municipality has no right to open a new road across a track already constructed. See also **Reid v. Canada Atlantic Ry. Co.**, 4 C.R.C. 272; but **St. Liboire v. G.T.R.** must be taken to be over-ruled under the Act as at present worded. A standard highway crossing was ordered to be made at a point where there had been an old trail and the public had been permitted to cross for a long period. **Moodie v. C.P.R.**, 20 C.R.C. 217.

The Board has no power to compel railway companies to open up highways across their lands. The function of the Board under section 256, *infra*, is to give leave to a municipality or other party having power to open up new highways to do this across a railway. This legislation is based upon the view that railway companies' land has been devoted to a statutory use, and that in the absence of statutory provision therefor the municipality or other road authority could not construct a highway over the railway lands. **Re Application of Village of Manville, Alberta**, for crossing the Canadian Northern Ry. Co's. line of railway. Feb. 13th, 1908, 4th Annual Report, p. 238. See **Mission District v. C.P.R.**, 14 C.R.C. 331.

Where a municipality seeks to open a crossing over a highway, the uniform practice is to put the whole cost of construction and maintenance on the applicant: **Mission, etc., v. C.P.R.**, 14 C.R.C. 331; **Lachine v. G.T.R.**, 18 C.R.C. 385; **Mont Laurier v. C.P.R.**, 18 C.R.C. 387; **Saskatchewan, etc. v. C.N.R.**, 19 C.R.C. 295; **County of Pontiac v. C.P.R.**, 19 C.R.C. 298; **London v. G.T.R.**, 20 C.R.C. 242; **Sasman v. C.N.R.**, 20 C.R.C. 246. Where work is part of civic improvement and railway bridge is reconstructed, see **Hamilton v. Hamilton Electric Ry. Co. & T.H. & B.**, 19 C.R.C. 290.

In the Province of Quebec there are no road allowances. Roads are opened by authority of municipalities, or the Lieutenant-Governor-in-Council, or by dedication. If nothing in the application shews the road was constructed before the railway, the crossing will be ordered at the expense of the municipality: **County of Pontiac v. C.P.R.**, 19 C.R.C. 298. But where the railway lays out a townsite and benefits by the sale of land in the townsite, it should assist in providing suitable facilities to the public to get across the railway property by paying part of the cost: **City of Regina v. C.P.R.**, 11 C.R.C. 165, **Medicine Hat v. C.P.R.**, 16 C.R.C. 413, **Virden v. C.P.R.**, 21 C.R.C. 70.

The company is at liberty but not obliged to construct the crossing or leave may be given to the municipal or other body having authority to open up a highway across private property without the consent of the owner. In the latter case the railway company is under no more obligation to bear the expense than a private owner would be. **Re Neelon Highway Crossing**, 4th Annual Report, p. 194.

See also **High River et al. v. C.P.R.**, 6 C.R.C. 344; **Village of Weston v. G.T.R. and C.P.R.**, 7 C.R.C. 79.

Under the present practice the Board will recognize the public necessity for a highway crossing over a railway, especially at or near a point where for a long period the railway company has allowed the public the use of such crossing, even though the crossing does not form part of a legal highway. **Moodie v. C.P.R.**, 20 C.R.C. 217; following **Weston v. C.P.R. and G.T.R.**, 7 C.R.C. 79; but the applicant may be ordered to re-imburse the railway company for the cost of construction, maintenance and protection of the crossing: **St. Pierre v. G.T.R.**, 13 C.R.C. 1.

The case where the powers of the Board were carried farthest, and subsequently upheld by the Courts was **C.P.R. v. Toronto & G.T.R.** (1911), A.C. 461, 12 C.R.C. 378, on appeal from 42 S.C.R. 613, 11 C.R.C. 38 (**Toronto Viaduct Case**). It was there held that though the right of crossing claimed by the public was not shewn to be on a highway senior to the railway, yet where there had been user by the public for many years, whether by right or leave and license, express or implied, the crossing was a "public way or communication" within the meaning of section 2 (11), and the Board had jurisdiction to order protection. It was further held that the Board, where it has jurisdiction, may make any order for the carrying of the railway over, under or along the highway, which it deems expedient for the protection, safety and convenience of the public; and that on appeal, only the jurisdiction to make the order, and not the ethics of the order, would be reviewed.

Where a road was shewn on a plan, registered before the construction of the railway, but was not adopted by the city and was never opened or used it is not a highway within the meaning of the Act and the city cannot compel the railway to allow a crossing: **Toronto v. G.T.R.**, 2 O.W.R. 3, reversed 4 O.W.R. 491; see **Township of Caldwell v. C.P.R.**, 9 C.R.C. 497.

Where a location plan of a railway sanctioned by the Board has been deposited in the Registry Office, the owner of lands shewn on the plan cannot interfere with the right of expropriation or render its exercise more burdensome or less advantageous to the company. And (so) roads shewn on a plan of a sub-division registered subsequently to the location plan, if not dedicated, actually used, constructed or accepted by the municipality at the date of the deposit of the location plan are junior to the railway: **Edmonton v. Calgary, etc., Ry. Co.**, 22 C.R.C. 182, 30 D.L.R. 222, 53 S.C.R. 406, on appeal from 16 C.R.C. 420; **City of Hamilton v. Hamilton Radial Ry. Co.**, 22 C.R.C. 438; **G.T.R. v. Hamilton**, 22 C.R.C. 442. But where a patent is made to a railway company of right of way without reservations, and the patent is issued under the authority of an Order in Council reserving five per cent. of the average for roadways, the title of the railway company is subject to such reservations, and although no highways were laid out at the date of the patent, subsequently laid out highways are senior to the railway if the five per cent. has not been exhausted: **C.P.R. v. Ontario Dept. of Public Works**, 24 C.R.C. 231, 45 D.L.R. 413, 58 S.C.R. 189.

Use of Streets. Where a company is authorised to lay rails upon a highway it may in the absence of express provision to the contrary, lay its rails closer to one side than the other though such action may be to the greater prejudice of the owners of property on one side of the street: **Attorney-General v. Montreal, etc., Ry. Co.**, 1 L.N. 580; **Robertson v. Chatham, etc., Ry. Co.**, 7 C.R.C. 96. In **Montreal v. Montreal, etc., Ry. Co.** (1903), A.C. 482, where a company was bound to remove snow from its tracks on the streets, but nothing was said about depositing it on the rest of the street, it was held that the company had the right to do so; but where a company sweeping the snow from its tracks was required by statute to carry it away from the rest of the street, it was compelled to indemnify the city against damages caused by its remaining on the rest of the road: **Toronto v. Toronto Ry. Co.**, 24 S.C.R. 589; **Mitchell v. Hamilton**, 2 O.L.R. 58. In **Hollinger v. C.P.R.**, 21 O.R. 705, 20 A.R. 244, Sir George Burton, at pp. 254, *et seq.*, questions the right of railways to occupy any part of the highway with tracks for their sidings; but this view has not been adopted in other cases in which, if that had been the law, the liability of the company would have been clear, such as **Canada Atlantic Ry. Co. v. Henderson**, 29 S.C.R. 632, and **Lake Erie, etc., Ry. Co. v. Barclay**, 30 S.C.R. 360. Sir George Bur-

ton's remarks were based upon the wording of R.S.C. (1886) cap. 109, secs. 12 (2) and 25 (7), which was the Railway Act then under discussion, but it is to be noted that under the interpretation clauses of the Act of 1903 and the present Act the term "the railway" used in this section includes "sidings" and is in every way much wider than the definition of the same words under R.S.C. (1886), cap. 109, sec. 4 (f). Any difficulty which might have existed at the time of Sir George Burton's remarks has since disappeared. For a further discussion of this subject see an article in 21 Can. Law Times at pp. 477, *et seq.*

Where a railway is authorised by law to run its cars upon the streets it has not such an exclusive right over that part of the highway occupied by its tracks as to require others lawfully using the streets to keep out of the way of its cars at all hazards and persons necessarily or properly upon or crossing the tracks are entitled to assume that cars will be driven prudently and moderately and not at such an excessive rate of speed as will render the occurrence of an accident probable: **Ewing v. Toronto Ry. Co.**, 24 O.R. 694; **Gosnell v. Toronto Ry. Co.**, 21 A.R. 553, 24 S.C.R. 582; see also **Rattee v. Norwich, etc., Co.**, 18 T.L.R. 562; but a company lawfully authorised to lay and use tracks upon a street has by law a superior right of use and will be entitled to damages from any one who unlawfully obstructs them in such use; as where defendants were moving a house along a street and blocked plaintiff's line thereby causing injury: **Toronto, etc., Ry. Co. v. Dollery**, 12 A.R. 679.

Enforcement of Right to Damages. Where the Board had made an order authorising the crossing of certain streets by a railway, upon condition that the railway company should enter into an agreement to indemnify the city against all claims for damages by abutting landowners, the Board refused, after the execution of the agreement, to order the railway company to carry out its terms, and left the applicant to its remedy in the courts: **Calgary v. C.N.R.**, 18 C.R.C. 25, and see **Smith's Falls v. C.P.R.**, 11 C.R.C. 180.

Where the applicant for damages under section 255 sustained by reason of the construction of an electric railway along the highway in front of his lands did not apply until two years after the work was finished, damages were refused by the Board: **Griffin v. Toronto Eastern Ry. Co.**, 20 C.R.C. 210. The Board has no jurisdiction to grant damages under this section, where the applicant

has signed an agreement releasing the railway company from such claims. Such a release must stand until set aside by a Court of competent jurisdiction: **Remy v. Lake Erie, etc., Ry. Co.**, 20 C.R.C. 207.

Highway to
be kept open.

(2) The company shall, before obstructing any such highway by its works, turn the highway so as to leave an open and good passage for carriages, and, on completion of the works, restore the highway to as good a condition as nearly as possible as it originally had.

Compare 8 Vict., cap. 20, secs. 53 and 54 (Imp.).

Substituted Road. This, like other statutory duties, may be enforced by mandamus; or where the action is taken on behalf of the public, by indictment: **Reg. v. Birmingham, etc., Ry. Co.**, 3 Q.B. 223; **Reg. v. Great North of England Ry. Co.**, 9 Q.B. 315; and it is no answer to a mandamus to plead that in order to substitute another road the company will have to obtain additional lands. This was laid down in England even though the company's statutory right to take lands had expired: **Reg. v. Birmingham, etc., Ry. Co.**, 2 Q.B. 47; but if a company has permanently leased its line to another railway, no mandamus will be granted: **Re Bristol, etc., Ry. Co.**, 3 Q.B.D. 10. Under the corresponding English section it has been held that it applies equally to a temporary as to a permanent obstruction: **Attorney-General v. Barry Docks Co.**, 35 Ch. D. 573, and see **Tanner v. South Wales Ry. Co.**, 5 E. & B. 618; but a special act conferring similar powers may, of course, be so worded that a company is not bound to substitute a new road for one with which it has interfered: **Tanner v. South Wales Ry. Co.**, 5 E. & B. 618. Generally, however, a company is not relieved from making a substituted road even though there may be an existing road as convenient as any such substituted road may be: **Attorney-General v. Great Northern Ry. Co.**, 4 DeG. & Sm. 75. Where the effect of a company's works is to cut off all access to a road from adjoining property an equally convenient means of access in the nature of a substituted road must be furnished: **Hay v. Glasgow, etc., Ry. Co.**, 1 Ct. of Sess. Cases, 4th Ser. 1191. In Scotland it has been held that a company is not bound to repair such substituted road though it may have to repair any bridges on it that it may have built: **Perth v. Kinnoull**, 10 Ct. of Sess. (3rd Series) 874, but in Ontario where a stream had been diverted and a new bridge built by the railway which was not upon the railway line, it was held that there was no duty on the part of the company to repair

the bridge: **Peterboro v. G.T.R.**, 1 C.R.C. 494, 497. In England where a highway has been closed and a new one substituted the portion of the old highway so closed becomes extinguished as a highway: **Melksham, etc., Council v. Gay**, 18 Times L.R. 358; following **Salisbury v. Great Northern Ry. Co.**, 5 C.B.N.S. 174.

Temporary Obstruction. Where work is necessarily being done upon a street which causes an obstruction, a person who is injured because of its want of repair cannot recover where the work is being done in the usual way and without undue delay; particularly if there is to the knowledge of the person injured a safe way close at hand: **Keachje v. Toronto**, 22 A.R. 371, the general rule being that where harm results to anyone through the performance of what is authorised by law it is **damnum absque injuriâ** where ordinary skill and care are shown in the performance of the work: **Atkin v. Hamilton**, 24 A.R. 389, at p. 390, reversing 28 O.R. 229; and this case decides that even if during operations there is no safer road provided, that is not of itself evidence of want of care and skill.

Restoring Road. Under the original Railway Act, 14 & 15 Vict., cap. 51, sec. 12, it was thought by the court though not then decided, that it was quite proper for a railway company to permanently divert a highway and that it was not bound when its railway had been completed to replace the old highway: **Fredericksburg v. G.T.R.**, 6 Gr. 555; but where in the course of construction a ditch was left alongside a highway to take off water, it was held that being a source of danger the company was bound to cover it so as to restore the highway as nearly as possible to its former state of safety, and not having done so it was liable to a person who had been injured: **Fairbanks v. Great Western Ry. Co.**, 35 U.C.R. 523. Where a city was empowered to authorise certain railway works upon highways which it did, but it was found that in course of executing them a pool of stagnant water would necessarily be created, it was held to be no ground for compelling the company to desist or else fill in the space occupied by the water: **Kingston v. G.T.R.**, 8 Gr. 535.

(3) Nothing in this section shall deprive any such company of rights conferred upon it by any Special Act of the Parliament of Canada, or amendment thereof, passed prior to the twelfth day of March, one thousand nine hundred and three. R.S., c. 37, s. 235; 1911, c. 22, s. 6. Am.

Rights
saved.

Sections 255 and 256 enable a company having powers to manufacture steam for heating purposes to lay and maintain conduits containing pressure steam across public highways. **Toronto Terminals Ry. Co. v. Toronto and Toronto Harbour Commissioners**, 24 C.R.C. 71.

The construction of a railway on a highway is objectionable and will only be authorised under special circumstances. **Essex Terminal Ry. Co. v. Sandwich**, 19 C.R.C. 304.

Terms as to construction, operation and protection were imposed upon a railway as a condition of permitting highway crossing (constructed without authority) to be continued. **Ottawa v. G.T.R.**, 14 C.R.C. 185.

Application
for crossings.

256. (1) Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.

Powers of
Board.

(2) The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, or that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing.

Protection,
etc.

As to land
required.

(3) When the application is for the construction of the railway, upon, along or across a highway, all the provisions of law at such time applicable to the taking of land by the company to its valuation and sale and conveyance to the company, and to the compensation therefor, including compensation to be paid to adjacent or abutting landowners as provided by the next preceding section, shall apply to the land exclusive of the highway

crossing, required for the proper carrying out of any order made by the Board.

(4) The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision.

Supervision.

(5) When the Board orders the railway to be carried over or under the highway, or the highway to be carried over or under the railway, or any diversion temporarily or permanently of the railway or the highway, or any works to be executed under this section, the Board may direct that detailed plans, profiles, drawings and specifications be submitted to the Board.

Detailed plans, etc., in certain cases.

(6) The Board may make regulations respecting the plans, profiles, drawings and specifications required to be submitted under this section. 1909, c. 32, s. 4.

Regulations by Board.

Former section 237 as amended and re-enacted by 8-9 Edw. VII., cap. 32, section 4.

The word "existing" which formerly appeared in the corresponding sections before "highway" and "railway" has been deleted. Throughout this and the next section power is given by the amendment of 1909 expressly to direct the railway to be carried over, under or along the highway, the latter amendment was probably introduced in consequence of an objection made to the jurisdiction of the Board to order elevation of tracks in **C.P.R. v. Toronto and G.T.R. (Toronto Viaduct Case)** (1911), A.C. 461, 12 C.R.C. 378.

Even where the plans for passing over a highway have been approved, this does not empower a railway company to enter on or injuriously affect the lands of private parties affected by the works until the usual notices of expropriation have been given and proper compensation has been made: **Parkdale v. West**, 12 A.C. 602; **Edmonton v. G.T.P.**, 13 C.R.C. 444; **Dominion Iron and Steel Co. v. Burt**, 20 C.R.C. 134, 33 D.L.R. 425, and the existence of a municipal by-law approving of the work, did not dispense with the prior performance of these statutory conditions: **Hendrie v. Toronto, etc., Ry. Co.**, 26 O.R. 667, 27 O.R. 46. Apparently under the present enactment, these cases still apply. In the case of **West v. Parkdale**, 12 S. C.R. 250, the Supreme Court discussed the question

whether the railway companies could delegate to a municipality, the power conferred upon the former to expropriate lands necessary for the alteration of a highway, but held upon the facts, that in this case the former was not acting as agent of the railways. This point, however, was not touched upon by the Privy Council in its judgment. See also cases cited under statutory requirements under sec. 255.

The Board in dismissing an application by a railway company to construct a railway on a highway, has no jurisdiction to impose terms on a municipality. **Montreal v. C.P.R.**, 21 C.R.C. 224.

The words "upon such terms and conditions as to protection, safety and convenience of the public, as it may deem expedient," do not empower the Board to affix as a condition of granting the crossing the acquisition by the railway company of additional land: **C.N.Q. Ry. Co. v. Montreal**, 18 C.R.C. 389. It is doubtful if this section applies to land of a railway company not used as right of way. **St. Thomas v. G.T.R.**, 13 C.R.C. 134.

It was suggested in the former edition of this book that the power of the Board was permissive only except where a public right of crossing exists. Some doubt has been thrown on this point by **C.P.R. v. Toronto and G.T.R. (Toronto Viaduct Case)**, *supra*. In **Toronto Ry. Co. v. Toronto (Queen Street High Level Bridge Case)** (1920), A.C. 426, 25 C.R.C. 318, 51 D.L.R. 55, the municipality made an application for certain improvements by way of grade separation at a crossing, and the order was held by the Privy Council to be mandatory and not permissive only. In **Toronto Ry. Co. v. Toronto and C.P.R. (Avenue Road Subway Case)**, 30 D.L.R. 86, 53 S.C.R. 222, 20 C.R.C. 280, it was held that the Board of its own motion might make an imperative order for the separation of grades at a crossing. But these cases both deal with crossings already in existence, and except for the **Toronto Viaduct Case**, there seems to be no authority against the rule that where a municipality seeks to open up a new highway across a railway, its order is permissive only. Where the Board makes a permissive order in favor of a municipality, the municipality must decide as to the expediency of the work authorised; the Board will not interfere. **Winnipeg v. C.P.R.**, 18 C.R.C. 317.

In **G.T.R. v. Toronto**, 1 C.R.C. 82, Meredith, J., decided that though the provincial legislature could alone confer power upon a municipality to acquire land for

making a street, such legislation was, in cases where it desired to cross land occupied by the tracks of a Dominion railway subject to the supervision of the Federal Parliament and in **St. Liboire v. Grand Trunk Ry. Co.**, 16 L. C.R. 198, 1 L.C.L.J. 54; **Reid v. Canada Atlantic**, *supra*, (p. 368), it was decided that apart from the provisions of any federal enactment, a municipality had no power to decide how a new highway should cross a Dominion railway. Where, however, a railway passes over an unopened road allowance, the municipality may direct that it be opened and may compel the railway to take down its fences which lie across the road: **Gloucester v. Canada Atlantic Ry. Co.**, 1 C.R.C. 327, 334.

As to the modern practice of the Board, however, see notes to section 255, **Opening Highways Across Railways**.

Temporarily or Permanently Diverted. See notes to section 255, sub-section 2, *ante*. In the **Yonge Street Bridge Case**, 6 O.W.R. 853, 10 O.W.R. 483, it was held that similar provisions in section 187 in the Act of 1888 though disjunctive in form might be taken advantage of cumulatively.

Adopting the meaning given to "highway" in the interpretation clause, sec. 2 (11) as including "a public way or communication," the Board has in some cases made provision for protection at places where the public has been allowed by the Company to cross the railway, although no highway existed in the strict legal sense. **C.P.R. v. Toronto and G.T.R.**, (**Toronto Viaduct Case**), 42 S.C.R. 613; 11 C.R.C. 38; (1911) A.C. 461, 12 C.R.C. 378; **Denison Ave. Crossing Case**, 7 C.R.C. 79; **Yonge Street Bridge Case**, 6 O.W.R. 853, 10 O.W.R. 483, and see notes to section 255. Usually the municipality bears a portion of the cost of protection, but no definite rule can be laid down. The right to impose a portion of such cost upon the municipality or municipalities interested at highway crossings which was much discussed in **C.P.R. v. Township of York**, 1 C.R.C. 36, 47, has since been strengthened by successive amendments to sections 59 and 238, now 39 and 257, and is now firmly established; see **City of Toronto v. C.P.R.** (1908), A.C. 54, 7 C.R.C., 282, **City of Toronto v. G.T.R.**, 37 S.C.R. 232, 5 C.R.C. 138; **Bank Street Subway Case**, 37 S.C.R. 354, 5 C.R.C. 131. The Board in deciding how the cost of protection should be apportioned is a Court of original jurisdiction and must decide for itself the questions of law and fact involved, and also in the exercise of its discretion whether

the municipality should contribute, **Cedar Dale Crossing Case**, 7 C.R.C. 73, **Toronto Ry. Co. v. Toronto**, *supra*.

For examples of the way the cost of construction, maintenance and protection at crossings has been apportioned, see **Saskatchewan, etc. v. C.P.R.**, 14 C.R.C. 337; **St. Thomas v. Michigan, etc., Ry. Co.**, 14 C.R.C. 338; **Hamilton, etc., Ry. Co. v. G.T.R.**, 17 C.R.C. 393; **Thamesville v. G.T.R.**, 23 C.R.C. 33; **Walkerville v. G.T.R. and Pere Marquette Ry. Co.**, 24 C.R.C. 1. As a rule, when the highway is senior and a railway is carried across it, the railway bears the cost of the crossing, and when the railway is senior and the municipality seeks to carry the highway across the railway, the municipality bears the cost of the crossing without compensation, however, to the railway company for an easement over the right of way. **Bridgeburg v. G.T.R.**, 14 C.R.C. 10.

See the notes to sections 255 and 252. But in apportioning the cost of protection at railway crossings of highways which have been in existence for many years, the volume of traffic on the highway and railway respectively which has made the crossing dangerous, is an element to which more weight should be given than the question of seniority merely. **Ste. Anne de Bellevue et al. v. G.T.R., and C.P.R.**, 16 C.R.C. 250; **Montreal v. G.T.R.**, 22 C.R.C. 444.

By section 260, where railways are constructed after 19th May, 1909, the company bears the whole cost of protecting the crossing.

The Board will not order a railway company to provide a right of way over its tracks to be used temporarily as a municipal highway, without the consent of the company. **Town of Courtney v. Esquimalt, etc., Ry. Co.**, 18 C.R.C. 384, nor for the convenience of a few land-owners or as a dangerous private crossing. **Bush v. G.T.R.**, 16 C.R.C. 437.

The Board has power under sections 256 and 257 to divert a highway but not to close it, 15 C.R.C. 305. The Board may authorise the construction of a footbridge where no highway previously existed: **Vancouver v. C.P.R.**, 9 C.R.C. 478. The same principles as to seniority apply to the crossing of a telephone line by a railway: **London Ry. Commission v. Bell Telephone Co.**, 18 C.R.C. 435. The Board has jurisdiction to authorise a highway to be carried across a block of land adjoining the railway right of way purchased for railway purposes: **St. Thomas v. G.T.R.**, 13 C.R.C. 134.

Watchmen and Gates. In England under 8 Vict. cap. 20, sec. 47, the railway company is compelled to maintain gates and watchmen at every crossing and it has been held that whether the gates are open or closed the company must see that the line is reasonably safe: **Lunt v. London, etc., Ry. Co.**, L.R. 1 Q.B. 277; **North Eastern Ry. Co. v. Wanless**, L.R. 7 H.L. 12; **Charman v. South Eastern Ry. Co.**, 21 Q.B.D. 524. Some discussion has taken place as to whether a person who finds a gate closed and sees no one in attendance is entitled to open it himself and it was held by a majority of the court in **Wyatt v. Great Western Ry. Co.**, 6 B. & S. 709, that if a person thus opens a gate and is injured by a train, he cannot recover, but in **Reg. v. Strange**, 16 Cox C.C. 552, it was thought that if this case came before a higher court it might be overruled. If gates are placed at a crossing whether under an order or voluntarily by the company, it is the latter's duty to see that they are maintained in a proper state of repair, and, if, for instance, they are frozen and do not work whereby an accident happens, the company will be liable: **Fleming v. C.P.R.**, 31 N.B.R. 318, 22 S.C.R. 33, and it is the duty of a watchman placed at a crossing to take every precaution in his power to warn the public: **Smith v. South Eastern Ry. Co.** (1896), 1 Q.B. 178. Where a watchman placed by a company at gates maintained by order of the railway company, threw a cinder at a boy who was leaning on the gates preventing him from raising them and the boy's eye was injured, it was held by Anglin, J., in charging a jury that the company might be responsible as for an act done in the course of his employment: **Hammond v. G.T.R.**, 9 O.L.R. 64, 4 C.R.C. 232, and a verdict against the latter in favour of the boy and his mother was returned and upheld by a Divisional Court.

Common Law—Duty to Protect Level Crossings. Under the provisions of section 267, *infra*, signboards must be placed at level crossings and by section 308, a train approaching a level crossing must sound a whistle at least 80 rods before reaching the crossing, and then the bell must be rung continuously until the engine has crossed the highway, and a penalty is provided for failure to comply with these provisions. There has been some doubt whether the provisions contained in these sections are, in the absence of any order of the Railway Committee or the Board, the complete measure of the company's duty in approaching a highway, and in England it has been laid down in **Stubbley v. London, etc., R. W. Co.**, L.R. 1 Ex. 13, that a railway is not required to do

more than is prescribed by the statute and it is not open to a jury to find that owing to the particular nature of the crossing, additional measures should be taken to warn the public. This decision was quoted with approval by Mr. Justice Patterson in **C.P.R. v. Fleming**, 22 S.C.R. 44, a dissenting judgment. So far as the case is applicable upon this point, the decision of the majority was to the effect that it is open to a jury to find that other measures should be taken to protect a more than ordinarily dangerous level crossing, besides those prescribed by the statute. The effect of the **Stubley Case** might perhaps also be weakened by **Smith v. South Eastern Ry. Co.** (1896), 1 Q.B. 178. In Canada it was said in **Lett v. St. Lawrence, etc., Ry. Co.**, 1 O.R. 545, that where the scene of the accident was an unusually dangerous crossing and there was in the opinion of the jury a failure not only to give the statutory signals, but also to provide a man on the rear end of a car which was moving reversely, this might be sufficient ground for an action. The case is also reported in 11 A.R. 1, and 11 S.C.R. 422, but the judgments in the higher courts were directed to the question of damages only. The principle of the case was, however, relied on in **Henderson v. Canada Atlantic Ry. Co.**, 25 A.R. 437, and 29 S.C.R. 632, and Sir Henry Strong at page 636 of the latter report says: "Further I think it right to say that on all this evidence (that the bell did not ring, that the speed was over six miles an hour, and that a flagman who was stationed there, did not give warning) we should be justified in holding that there was common law negligence as in the case of **St. Lawrence & Ottawa Ry. Co. v. Lett**." In **Lake Erie, etc., Ry. Co. v. Barclay**, 30 S.C.R. 360, where shunting was being done in a town, and the jury found that the railway company was guilty of negligence in that a man should have been stationed on a highway to warn the public of the operations then going on, a verdict for the plaintiff was upheld, and a similar rule has been adopted in the United States: **Pennsylvania Ry. Co. v. Miller**, 99 Federal Reporter 529. In **Girouard v. C.P.R.**, 1 C.R.C. 343, Curran, J., in Quebec, decided that where the railway traffic at a highway crossing was very great and there was no gate, guardian, lamp or other protection for the public, although the company had been notified of the dangerous condition of the crossing, it was responsible for the death of the plaintiff's son which occurred without any fault on the latter's part. Also in **Moyer v. G.T.R.**, 3 C.R.C., 1, it was laid down by the Court of Appeal for Ontario, that special circumstances may call for other provisions

in addition to those prescribed by statute as to ringing the bell or blowing the whistle as a warning, and what those additional precautions should be is in each case a question for the jury, and the **Barclay Case** in the Supreme Court was followed. The subject is also dealt with in **Tanguay v. G.T.R.**, 3 C.R.C. 13, but the decision turned on other points. In **McKay v. G.T.R.**, 3 C.R.C. 42, the Court of Appeal refused to set aside a judgment entered on findings of a jury that the injury complained of was caused by the excessive speed of the train, coupled with the absence of proper protection at the crossing and that it was under the circumstances the duty of the company to provide a flagman or gates, although there was no order of the Railway Committee requiring that this should be done. This judgment was reversed by the Supreme Court in **G.T.R. v. McKay**, 3 C.R.C. 52, and it was stated by Mr. Justice Davies, who delivered the judgment of the court, that by the Railway Act, Parliament had vested in the Railway Committee of the Privy Council (now the Board of Railway Commissioners) the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level, and that these powers are not subject to review either as to their adequacy or otherwise by a jury, nor is any failure to invoke the exercise of the powers of the Railway Committee sufficient to take the matter away from that jurisdiction and vest it in a jury. The case of **Lake Erie, etc., Ry. Co. v. Barclay**, 30 S.C.R. 360, was distinguished and it appears from this judgment that unless the Board of Railway Commissioners have prescribed additional precautions at railway crossings, it is not open to a jury to find that a railway company is guilty of negligence because it failed to take some additional precaution, which neither the statute nor the Board of Railway Commissioners has required.

Recent amendments appear to strengthen this statement of the law as applicable to such cases.

Right to Take Highway. It will be seen that under section 255, a company may under certain conditions run its railway "upon, along, or across any existing highway," but nothing is there said about a company actually taking and closing a part of the highway for the purposes of its undertaking. The Board has expressed its opinion that it has not the power to order the closing of a highway without the consent of the municipality, 15 C.R.C. 305. By section 162 (c) it may take the "lands" of any

“person” for the construction of its railway and by section 162 (k) it may construct its lines “upon, across, under or over anyhighway which it intersects or touches.” “Lands,” by section 2 (15) “means the lands, the acquiring, taking or using of which is authorised by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same.”

In the case of many of our Canadian roads the fee is vested in the Crown and the interest of the Crown cannot be expropriated without its consent, secs. 189 to 192, and the Crown in such a case would be represented by the Provinces: **Re Trent Valley Canal**, 11 O.R. 687. In such a case, therefore, it would appear that there can be no expropriation of the fee without the consent of the proper Provincial authorities. In practice where a street or highway is to be closed any difficulty is overcome by entering into an agreement with the municipality whereby the road is closed under the latter's statutory powers in that behalf and then conveyed to the railway company.

As pointed out in the first edition (1905), p. 270, it has always been considered doubtful whether the company could actually expropriate and close up a part of the highway necessary for its undertaking, and in view of the special provisions applicable to the user of highways and the limited nature of the interest in them which is specially conferred by the Act, it was suggested that the Company could acquire no more than an easement in highways and could not expropriate the fee in them. Since 1905, section 200 as amended by 6 Edw. VII., c. 42, s. 9, gives the Board power in the cases specified to authorise the taking by the Company of lands for the diversion of “a highway or for the substitution of one highway for another.” See 15 C.R.C., 305 as to jurisdiction of the Board.

In Ontario the soil and freehold of the highways are vested in the municipalities: (The Municipal Act, R.S.O., cap. 192, sec. 433). It is possible that the highway may now be closed and expropriated in Ontario, but the point does not seem to have arisen since the amendment to the Municipal Act. There appears to be no objection to closing a highway by consent of the municipality having jurisdiction. It is to be noted that the new provision for compensation to municipalities in section 255 is confined to compensation for “carrying any railway along a

highway," and does not give the right of expropriation.

Compensation for Occupying Streets. The right of the Crown and the municipalities to compensation has been dealt with under section 255, *ante*. The right of an individual to compensation or damages may arise in either of three ways: (a) by direction of the Board, under section 255; (b) where by the closing, diverting or altering of a highway his access to it has been cut off or diminished—see notes to section 221; or (c) damages at law, where the company has not proceeded regularly in thus making use of the highway, and is in the position of a trespasser: **West v. Parkdale** and other cases under section 255, *supra*; but if he has sustained no damage other than that suffered by the general public he cannot under these cases recover damages at law, and if the Company has proceeded regularly, he must, if his right of access has been cut off or diminished, proceed under this and the other expropriation clauses of the statute: **Casgrain v. Atlantic, etc., Ry. Co.**, (1895) A.C. 282. If a person has been injuriously affected by a cutting in a street in a special manner, he may proceed against the company, but not against assignees who may have secured its rights and franchises: **Hamilton v. Covert**, 16 U.C.C.P. 205. A person who by the construction of a railway upon a road has lost the means of egress from his dwelling may recover for his loss: **Brown v. Toronto, etc., Ry. Co.**, 26 U.C.C.P. 206; **Lyon v. Fishmongers Co.**, 1 A.C. 662; and this right exists where means of access or egress have been impeded or additional fences or earthworks become necessary for preserving the land or properly enclosing it: **Reg. v. St. Lukes**, L.R. 7 Q.B. 148; **Moore v. Great Southern, etc., Ry. Co.**, 10 Ir. C.L. 46; **Caledonian Ry. Co. v. Walker's Trustees**, 7 A.C. 259, and if a road is narrowed whereby the value of property is depreciated a right to compensation arises: **Beckett v. Midland Ry. Co.**, L.R. 3 C.P. 82; **Metropolitan Board of Works v. McCarthy**, L.R. 7 H.L. 243; but if the injury is not to the property as such, but merely to the property as used for a particular purpose such as special kind of business carried on upon the premises, no right of action will accrue: **Rex v. London Dock Co.**, 5 A. & E. 163; **Rickett v. Metropolitan Ry. Co.**, L.R. 2 H.L. 185, and the temporary obstruction of a highway for the purpose of a public work does not entitle the owner of land adjoining the highway to compensation: **Herring v. Metropolitan Board of Works**, 34 L.J.M.C. 224; and the mere fact that a person is more injured from the proximity of his land to a level

crossing than others further away gives no right to compensation: **Caledonian Ry. Co. v. Ogilvy**, 2 Macq. (H.L.) 229; **Wood v. Stourbridge Ry. Co.**, 16 C.B.N.S. 222; and inconvenience and loss to owners adjoining a highway on which a railway is laid caused by vibration, smoke or noise, does not entitle the owners to damages: **Powell v. Toronto, etc., Ry. Co.**, 25 A.R. 209; **Re Medler and Toronto**, 4 C.R.C. 13, but in the case of **Jones v. Atlantic, etc., Ry. Co.**, Q.R. 12 K.B. 392, it was held that the owner of a bridge might recover for damages arising from a railway company crossing a public road leading to his bridge in such a way as to interfere with the means of access to the latter. Hall and Bossé, JJ., dissenting.

The remedy of property owners for injury resulting from closing of streets by a municipality under an agreement with a railway company is against the municipality by arbitration under the Municipal Act. **C.N.R. v. North Bay**, 18 C.R.C. 309, 23 C.R.C. 35.

Powers of
Board as to
existing
crossings.

257. (1) Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

Protection,
etc.

(2) When the Board of its own motion, or upon

complaint or application, makes any order that a railway be carried across or along a highway, or that a railway be diverted, all the provisions of law at such time applicable to the taking of land by the company, to its valuation and sale and conveyance to the company, and to the compensation therefor, shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board.

As to land
required.

(3) The Board may exercise supervision in the construction of any work ordered by it under this section, or may give directions respecting such supervision. 1909, c. 32, s. 5 (1), (2). Am.

Supervision
by Board.

Former section 238 as amended by 8-9 Edw. VII., cap. 32, sec. 5 (1) and (2). Sub-sec. (3) is new, and sub-section (3) of the Act of 8-9 Edw. VII., is now section 259. The Board has jurisdiction to order separation of grades at intersection of railways with public ways of communication: **Toronto Viaduct Case**, 11 C.R.C. 38, 12 C.R.C. 378.

A municipality may be a "party interested" in protective works at a highway crossing, though such works are neither within or immediately joining its bounds, and the Board has jurisdiction to order it to pay a portion of the cost of such works. **County of Carleton v. City of Ottawa**, 41 S.C.R. 552, 9 C.R.C. 154.

How far an applicant or a person or corporation interested in or affected by the works ordered is benefitted by these works, and what proportion of the costs it is fair to throw upon that person or company, is entirely a matter for the Board to decide: **Toronto Ry. Co. v. Toronto** (1920) A.C. 426, 25 C.R.C. 318, 51 D.L.R. 55, especially p. 328 of 25 C.R.C. The powers of the Board under section 39 are not displaced by sections 257, and 259: **Toronto Ry. Co. v. Toronto** (1920) A.C. 426, 25 C.R.C. 318, 51 D.L.R. 55; but when the Board makes a permissive order in favor of a municipality under sections 256 and 257, section 39 does not apply: **British Columbia Electric Ry. Co. v. Vancouver, etc., Ry. Co. and Vancouver** (1914) A.C. 1067, 18 C.R.C. 287, 19 D.L.R. 91, on appeal from 48 S.C.R. 98, 15 C.R.C. 237, 13 D.L.R. 308; but see **Hamilton, etc., Ry. Co. v. G.T.R.**, 17 C.R.C. 393. For a discussion as to the principles upon which the Board acts in apportioning the cost of separation of grades, see **Hamilton, etc., Co. v. G.T.R.**, *supra*; also **Vancouver v.**

G.N. Ry. Co., 14 C.R.C. 333; **Toronto v. C.P.R.**, 19 C.R.C. 293.

Section 262, *infra*, provides for contribution from the Grade Crossing Fund towards the cost of such works.

The Board may direct the elevation of some tracks over or upon a highway, allow others to remain on the level and direct the removal of others. Where a railway company had raised its tracks from ten inches to two feet above the level of the street in contravention of an agreement with the town it was held that the Board had jurisdiction, if the civic authorities allowed the railway and the street to remain in such a condition as to unduly obstruct traffic, to direct the town instead of the railway company to take the necessary measures for the protection of the public. **Re McGregor-Gourlay Company's complaint**, 25th June, 1906, 4th Annual Report, p. 169.

Public Utility Corporations having works on the highway are not entitled to compensation for the cost of alterations in their own works: **Bell Telephone Co. v. C.P.R.**, 14 C.R.C. 14.

Where highway carried by bridge across tracks and adjoining railway yard, municipality held not liable to contribute to cost of crossing yard. **Saskatchewan District v. C.P.R.**, 14 C.R.C. 337.

The Board may of its own motion make any order it deems expedient for the protection, safety and convenience of the public: **Toronto Viaduct Case**, *supra*, under section 255.

The three main factors to be considered as creating the necessity for protection at highway crossings are, the number of trains, and especially the rate of speed at which trains run over the crossing, the amount of vehicular and pedestrian traffic over the crossing, and the view which those using the highway have of trains approaching in both directions. The rate of speed at which trains run is a matter of greater importance than the number of trains passing over the crossing. Only limited weight should be given to arguments, based on the amount of vehicular or pedestrian traffic passing over the crossing: **Township of Front of Escott v. G.T.R.**, 12 C.R.C. 315. The nature of the protection required is a matter for the Board only: **Tavistock v. G.T.R.**, 13 C.R.C. 442; and see **Thamesville v. G.T.R.**, 23 C.R.C. 33.

The Board may act of its own motion to eliminate or

diminish grade crossings, and may require the proper municipality to close a highway and the railway company in such case is relieved from fying plans, etc., with the Registrar of Deeds: **Brant v. C.P.R.**, 36 O.L.R. 619, 20 C.R.C. 268, 30 D.L.R. 782.

The Board exercised jurisdiction to compel proper lighting of a railway bridge and its approaches when used for vehicular and pedestrian traffic on payment of tolls, the bridge having been subsidised under the Dominion Railway Subsidy Act, 1900, c. 8: **Mahon v. G.T.R.**, 16 C.R.C. 268.

258. The Board shall, without limiting any general power elsewhere conferred, have power, for the purpose of diminishing the danger at any highway crossing with any railway heretofore or hereafter constructed, to order,—

Preventing
obstruction
of view.

(a) that any trees, buildings, earth or other obstruction to the view, which may be upon the railway, or the highway or any trees on any adjoining lands, shall be removed;

(b) that nothing obstructing the view shall be placed at such crossing or nearer thereto than the Board designates;

and for any such purpose the Board shall have power to authorise or direct the expropriation of any land, the acquirement of any easement and the doing of anything deemed necessary, and shall have power to fix and order payment of such compensation as it deems just. **New.**

This section is new. What is meant by the words "the acquirement of any easement" is doubtful. The section seems to have been passed in the interests of the public, while an easement is for the benefit of and can be enjoyed only in connection with the dominant tenement, which, presumably, would be the railway company's lands, in which the public have no rights.

259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the

Apportion-
ment of cost
of protection,
etc.

last three preceding sections, and such order shall be binding on and enforceable against any railway company, municipal or other corporation or person named in such order. 1909, c. 32, s. 5 (3).

Former sub-sec. (3) of section 238 as amended by 8-9 Ed. VII., cap. 32, sec. 5 (3).

The powers of the Board under section 39 are not displaced by this section: **Toronto Ry. Co. v. Toronto** (1920) A.C. 426, 25 C.R.C. 318, 51 D.L.R. 55; but when the Board makes a permissive order in favor of a municipality section 39 does not apply: **British Columbia Electric Ry. Co. v. Vancouver, etc., Ry. Co. and Vancouver** (1914) A.C. 1067, 18 C.R.C. 287, 19 D.L.R. 91, on appeal from 48 S.C.R. 98, 15 C.R.C. 237, 13 D.L.R. 308; but see **Hamilton, etc., Ry. Co. v. G.T.R.**, 17 C.R.C. 393.

The Board has power to order a provincial company to contribute towards the expenses of works ordered under these sections: **Toronto v. C.P.R.** (1908), A.C. 54, 7 C.R.C. 282; **Toronto Ry. Co. v. Toronto** (1920) A.C. 426, 25 C.R.C. 318, 51 D.L.R. 55; **Toronto Ry. Co. v. Toronto and C.P.R.**, 53 S.C.R. 222, 20 C.R.C. 280, 30 D.L.R. 86.

When grade separation is ordered the lighting of a highway bridge over a railway is chargeable to the municipality except the increased cost beyond that of lighting which the highway would require but for the bridge. **Lachine v. G.T.R.**, 20 C.R.C. 82.

Where under agreement with a municipality a railway company has separated the grades by means of a bridge of a certain size, and the bridge has become inadequate by reason of increase of traffic, the company will be ordered to widen the bridge to the full width of the street, but the municipality will be ordered to pay for surfacing the bridge and approaches and for the necessary curbing: **Toronto v. G.T.R.**, 25 C.R.C. 344; and similarly when the bridge was constructed under an order of the former Railway Committee: **Hamilton v. C.P.R. and T.H. & B. Ry. Co.**, 25 C.R.C. 379, where the general principle was first laid down, see p. 384. And see **Brantford v. G.T.R.**, 23 C.R.C. 7, 24 C.R.C. 371; **C.P.R. v. Montreal and Montreal Tramways Co.**, 23 C.R.C. 31, following **Toronto Ry. Co. v. Toronto and C.P.R.**, 53 S.C.R. 222, 20 C.R.C. 280.

Where highway crossings on a railway are eliminated by the diversion of a highway, the rule usually followed

by the Board is to place the greater burden of the cost on the railway: **Canadian Government Rys. v. Township of Mulgrave and Nova Scotia Dept. of Works and Mines**, 24 C.R.C. 68; **Thamesville v. G.T.R.**, 23 C.R.C. 33.

In the case of separation of grades for the purpose of carrying a highway under a railway, the senior and junior rule usually applied to the crossing of one railway over another, should not be given as much weight as it is given in the case of two railways. In cases of highway and railway crossings, the traffic on the highway and the traffic on the railway are more important factors in fixing the cost of the separation of grades than the question of seniority. **Municipalities of Ste. Anne de Bellevue and Senneville v. G.T.R. and C.P.R.**, 16 C.R.C. 250; **Toronto v. C.P.R. (Symington Avenue Crossing Case)**, 19 C.R.C. 293; **Hamilton v. C.P.R.**, 20 C.R.C. 159; **Windsor v. C.P.R.**, 21 C.R.C. 66; **Montreal v. G.T.R.**, 22 C.R.C. 444. Where a railway is carried across a highway, all the cost of the construction and maintenance of the highway crossing which results is put upon the railway. When new highways are laid out at the request of the municipality over railway tracks, and the property of the railway is thus made subject to the construction of a road across it and its use, in like manner, the cost and maintenance of the crossing is borne by the applicant. **Saskatchewan v. C.N.R.**, 19 C.R.C. 295.

The rule that the applicant pays all the costs of highway crossing railway or railway crossing highway does not apply where railway is benefited as a townsite owner. **Virden v. C.P.R.**, 21 C.R.C. 70.

Where a farm crossing came to be used as a public crossing but the railway company had not dedicated or recognized it as a highway crossing, the cost of constructing and protecting a standard highway crossing was placed upon the municipality with assistance from the Grade Crossing Fund. **Montreal v. C.P.R.**, 18 C.R.C. 50.

The Board in ordering a subway at municipal expense referred to the nearness of a level crossing at another street and directed that if the street were closed the cost of the subway should be divided between the municipality and the railway: **Winnipeg v. C.P.R.**, 18 C.R.C. 381.

The rule requiring the junior road to pay the whole cost of construction, protection and maintenance is relaxed in favor of a municipally owned street railway carried over a steam railway at a highway crossing, to the

extent of ordering the municipality to construct the crossing at its own expense but dividing the cost of construction and maintenance of protective appliances equally between the municipality and the steam railway company. **Edmonton v. G.T.P. and C.P.R.**, 15 C.R.C. 443. In the **Twenty-First Street Crossing Case** (Edmonton) the Board in giving leave to a municipally owned street railway to cross a steam railway at a highway crossing, where the highway was senior to the steam railway, refused to consider the street railway as junior, and directed that the entire cost of construction, maintenance of the crossing and protective appliance be divided equally between the city and the steam railway company and an appeal to the Supreme Court of Canada on questions of law and jurisdiction was dismissed. **Edmonton v. G.T.P.**, 14 C.R.C. 93.

See note as to senior and junior rule, priority of construction and apportionment of cost of crossing and protection, 15 C.R.C. 450.

Where a new highway was constructed across a railway in substitution for a former highway, in order to provide a less dangerous crossing, the expense was divided between the company and the municipality. **Sarnia v. Pere Marquette Ry. Co.**, 16 C.R.C. 233.

Where in the public interest grade separation is ordered and a city street lowered at the crossing of the street with a railway, telephone and telegraph companies should bear the expense of necessary alterations to their wires, the Board holding that while these companies have rights on the streets, they have no guarantee that the grade shall not be changed in the public interest. **Toronto Electric Light Co. et al v. C.P.R. et al.** 15 C.R.C. 309.

Where a street is at least contemporaneous with a railway the Board apportioned the cost of protection as follows: installation of gates, 20 per cent from Railway Grade Crossing Fund, 55 per cent. upon railway, and 25 per cent. upon the municipality; maintenance and operation, 70 per cent. upon the railway and 30 per cent. upon the municipality. **Lachine v. G.T.R.**, 18 C.R.C. 23.

The Board's practice in ordering protection by electric bell is to put the cost of installation and maintenance wholly upon the railway except a contribution from the Railway Grade Crossing Fund equal to 20 per cent. of the cost of installation. **Lachine v. G.T.R.** *ibid.*

A bridge over the Saskatchewan River was constructed under an order of the Board, the Company having first agreed with the Province to construct the bridge with a ten foot roadway on each side clear of the railway track. Fences were erected between the tracks and the roadways. The Board refused to order the company to instal a device to warn vehicular traffic from entering the bridge when engines and cars were passing over it, holding that the danger was incidental to the use of the bridge as a highway and not something for which the company were responsible: **Buckland v. C.N.R.**, 23 C.R.C. 13. Where the grades of a highway and railway are separated, the Board's practice is not to treat the cost of paving an unpaved street as part of the cost of the work, but where a permanent pavement has been destroyed by the construction of the works, the cost of new pavement is treated as part of the cost of the undertaking: **Vancouver v. Vancouver, etc., Ry. Co.**, 18 C.R.C. 296; **C.P.R. v. Calgary**, 18 C.R.C. 38.

The Board will not make an order for re-imbursement after protective measures have been voluntarily performed. **Bell Telephone Co. v. Windsor, Essex & Lake Shore Railway Co.**, 8 C.R.C. 20.

260. In any case where a railway is constructed after the nineteenth day of May, one thousand nine hundred and nine, the company shall, at its own cost and expense, (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipal or other corporation or person), provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway. 1909, c. 32, s. 6; 1910, c. 50, s. 14.

When railway to bear whole cost.

Former section 238A as enacted by 8-9 Edw. VII., cap. 32, sec. 6, as amended by 9-10 Edw. VII., cap. 50, sec. 14.

Where grades at a highway are separated by a subway, the whole cost of lighting must be borne by the railway company: **Moose Jaw v. C.N.R.**, 25 C.R.C. 341.

Where a highway crossing over a railway has not been legally established, the municipality should bear the cost of construction and maintenance of protection, required at the crossing. If the crossing existed prior to 1st April, 1909, the Board may grant a contribution from

the Railway Grade Crossing Fund: **Maisonneuve v. C.N. R.**, 22 C.R.C. 446.

This date, 1st April, 1909, appeared in the original section 238A 8-9 Edw. VII, c. 32, sec. 6; and by 9 Edw. VII., c. 50, sec. 6, it was changed to 19th May, 1909.

Foot bridges.

261. The Board may order any company to erect over its railway at or near, or in lieu of any highway crossing at rail level, a foot bridge or foot bridges, for the purpose of enabling persons, passing on foot along such highway, to cross the railway by means of such bridge or bridges. R.S., c. 37, s. 239.

Former section 239. For penalty for breach of this section see sections 444 and 445.

Railway
Grade
Crossing
Fund.

262. (1) The sums appropriated and set apart to aid actual construction work for the protection, safety and convenience of the public in respect of highway crossings of railways at rail level in existence on the first day of April, one thousand nine hundred and nine, shall be placed to the credit of a special account to be known as "The Railway Grade Crossing Fund," and shall be applied by the Board, subject to the limitations hereinafter set out, solely towards the cost (not including that of maintenance and operation), of actual construction work for the purpose aforesaid.

Apportion-
ment of
money by
Board.

(2) The total amount of money to be apportioned, and directed and ordered by the Board to be payable from any such annual appropriation shall not, in the case of any one crossing, exceed twenty-five per cent of the cost of the actual construction work in providing such protection, safety and convenience, and shall not, in any such case, exceed the sum of fifteen thousand dollars, and no such money shall in any one year be applied to more than six crossings on any one railway in any one municipality or more than once in any one year to any one crossing.

Provincial
contributions
to fund.

(3) In case any province contributes towards the said fund, the Board may apportion, direct and order payment out of the amount so contributed by such province, subject to any conditions and restrictions made and imposed by such province in respect of its contribution.

(4) In this section,—

“crossing,” means any steam railway crossing of a highway, or highway crossing of a steam railway, at rail level, and every manner of construction of the railway or of the highway by the elevation or the depression of the one above or below the other, or by the diversion of the one or the other, and any other work ordered by the Board to be provided as one work of protection, safety and convenience for the public in respect of one or more railways not exceeding four tracks in all crossing or so crossed;

“Crossing”
defined.

“municipality,” means an incorporated city, town, village, county, township, parish, or rural municipality. 1909, c. 32, s. 7; 1914, c. 50, s. 1. Am.

“Municipality”
defined.

(5) The grant of two hundred thousand dollars each year for ten consecutive years from the first day of April, one thousand nine hundred and nineteen, made under the provisions of an Act passed at the present session of Parliament shall be expended for the purposes mentioned in the said Act, subject to the terms and conditions in this section contained.

Grant for
rail level
crossings.

Former section 239A amended; in sub-sec 2 the contribution has been increased from twenty to twenty-five per cent and the amount from five to fifteen thousand dollars, while the number of crossings to which money may be applied in any one year has been increased from three to six.

Numerous orders have been made by the Board under the provisions of former section 239A; where twenty per cent. of the cost of protective works is paid out of the fund, a like amount is usually directed to be paid by the municipality interested, in cases where the expenditure is not considerable, and the remaining sixty per cent. is paid by the Company.

Where a highway crossing over a railway has not been legally established, the municipality should bear the cost of construction and maintenance of protection required at the crossing. If the crossing existed prior to April 1st, 1909, the Board may grant a contribution from the Railway Grade Crossing Fund.

No grant can be made under this section for maintenance: **Thamesville v. G.T.R.**, 23 C.R.C. 33. The Board

may make a further contribution towards the cost of protection works at a crossing after contributing to the cost of installing an electric bell at the same crossing more than a year before: **Lachine v. G.T.R.**, 18 C.R.C. 23.

The Board has power to grant assistance out of the Railway Grade Crossing Fund to the cost of protection of three highways in one municipality in one year. Where the Board had already granted a contribution towards protection at three crossings, and had ordered protection at five more, it gave a contribution towards the protection at three of the five crossings, provided the work was not completed until after the beginning of the next fiscal year: **Montreal v. G.T.R.**, 22 C.R.C. 444, so decided prior to the amendments made in 1919 to sub-sec. 2.

Where level crossings in existence prior to May 19, 1909, are protected under an order of the Board, the only workable arrangement is to divide the cost between the municipality and the railway company after deducting the contribution from the Railway Grade Crossing Fund. Where, however, the financial position of the municipality did not permit it to assume its proportion of the cost imposed, the Board rescinded an order for protection at certain level crossings: **Strathroy v. G.T.R.**, 26 C.R.C. 49.

A defacto public crossing was treated as a highway crossing for the purpose of an allowance from the Railway Grade Crossing Fund. **Medicine Hat v. C.P.R.**, 16 C.R.C. 413.

Where a highway crossing over a railway existed in fact prior to 1st April, 1909, though never legally established, the Board made an order legalizing the crossing and directing a contribution from the Railway Grade Crossing Fund towards protection: **City of Maisonneuve v. C.N.R.**, 22 C.R.C. 446.

Overhead
crossings.

263. Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet. R.S., c. 37, s. 240. Am.

Width and
height of
highway.

Former section 240. The amendments are clerical only.

Section 185 in the Act of 1888 provided that the inclination of the highway approaching the bridge should not be greater than one foot in twenty. This is now covered by section 266, *infra*.

Headway. A clear headway of fourteen feet is now required where only twelve feet was formerly required. The corresponding English provisions are to be found in 8 Vict., cap. 20, secs. 49, 50 and 51, but they deal with the subject much more in detail than is done in the Canadian Act. Under the English Act it has been held that these sections do not remove restrictions imposed upon the company by any special legislation affecting it: **Attorney-General v. Tewkesbury, etc., Ry. Co.**, 1 DeG. & Sm. 423; nor do they relieve it from any binding agreement for a greater breadth which the company may have made with a landowner: **Clark v. Manchester, etc., Ry. Co.**, 1 J. & H. 631. Where a company has been authorised to carry a highway under its tracks by means of a subway it must leave the full headway called for by the statute and yet avoid lowering the road so much that it will render it liable to floods: **Attorney-General v. Furness Ry. Co.**, 47 L.J. Ch. 776. Where a company's Special Act required it to cross a canal by means of a bridge having a clear headway of eight feet over the towing path, it was held that where the bridge gradually subsided so that there was only a headway of two feet over the canal, it was the duty of the railway to raise the bridge to leave the eight feet headway called for by statute, even though no such duty was expressly prescribed by the Act: **Glamorgan-shire Canal Co. v. Rhymney Ry. Co.**, 19 T.L.R. 240; but where a bridge has been constructed with a sufficient headway over a highway, but owing to changes made by the municipality having control of the highway the headway has been lessened, the railway company is not liable for the consequent damages, but only the municipality: **Carson v. Weston**, 1 C.R.C. 487, citing **Gray v. Danbury**, 54 Conn. 574; and where a railway lowers a road to enable it to pass under the track, the company is not bound to keep the slope of the highway in repair: **Waterford, etc., Ry. Co. v. Kearney**, 12 Ir. C.L. 224; **Fosberry v. Waterford, etc., Ry. Co.**, 13 Ir. C.L. 494; **London, etc., Ry. Co. v. Skerton**, 5 B. & S. 559.

Width of Roadway. The present provision requires that the road under a railway bridge shall not be less than twenty feet without the permission of the Board. As under section 256, the details of any alteration of a highway must be approved by the Board it would seem

to be a matter for that body to determine, how wide the passageway should be. Under section 264, it is provided that any structure by which a highway is carried over or under a railway, shall be at all times so maintained as to afford safe and adequate facilities for traffic. It would appear from this that a company could be compelled with the growth of the traffic through a subway to widen it where such a course becomes necessary. The subject of width of approaches will be dealt with under section 264, *infra*. See also notes to sections 266, 250, and 251.

Facilities for traffic.

264. Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure. 1909, c. 32, s. 8 (1).

Former section 241 as amended by 8-9 Edw. VII., cap. 32, sec. 241, but with sub-sec (2) of that amendment omitted.

This section was substituted by 8 and 9 Edw. VII., c. 32, s. 8 for section 241 in the Act of 1906 and sub-section 2 added. The corresponding section 189 in the Act of 1903 was new and constituted a further provision for safe-guarding the rights of users of a highway. It may be construed in the light of other sections of the Act as to require railway companies to enlarge bridges, subways and their approaches from time to time as the exigencies of an increasing traffic require. Section 257 gives the Board power to supervise the plans of highway crossings already constructed and so if there is now a right to compel railway companies to enlarge subways or bridges that right is probably vested in the Board. The principle is now laid down in *City of Hamilton v. C.P.R. & T.H. & B. Ry. Cos.*, 20 C.R.C. 159, 25 C.R.C. 379.

Repair of Highway Crossings and Bridges. This section provides for the maintenance of the "structure" so as to afford safe facilities for the traffic, from which it may reasonably be inferred that a railway company must maintain any highway crossing or bridge in a proper state of repair and will be liable for any damages that may arise from the want of repair. In England the statute expressly requires a railway company to repair bridges over highways (8 Vict., cap. 20, sec. 46), and where a public road is carried over the tracks by a bridge

the company must keep both the bridge and that part of the roadway upon it, including the metalling of the road, in proper repair: **North Staffordshire Ry. Co. v. Dale**, 8 E. & B. 836; **Newcastle v. North Staffordshire Ry. Co.**, 5 H. & N. 160; **Lancashire & Yorkshire Ry. Co. v. Bury**, 14 A.C. 417; but where it cross its track, it need not repair a bridge which it erected on such substituted road: **Perth Magistrates v. Kin-noul**, 10 Sc. Sess. Cases (3rd Ser.) 874; and so where it diverts a stream and builds a bridge over the diversion there is no duty on it to maintain such bridge, but such duty is laid solely upon the municipality: **Peterborough v. G.T.R.**, 1 C.R.C. 494. Where by agreement a railway company acquired land for a new roadway and carried it over its track by means of a bridge built on private lands acquired by the company and thereafter the old roadway fell into disuse it was held that, there being no structural necessity for the new highway and bridge, the English statute did not apply and the company was not bound to maintain or repair it or its approaches: **London, etc., Ry. Co. v. Ogwen**, 80 L.T.N.S. 401. It has generally been held in Canada, as in England, that a railway company must under the terms of the statute, repair bridges which it has erected and is liable to any person injured by reason of its failure to do so: **Van Allen v. G.T.R.**, 29 U.C.R. 436, and in the absence of any statute relieving it from such liability the municipality having charge of the road which is carried over the track by means of a bridge erected by a railway must also repair it: **Mead v. Etobicoke**, 18 O.R. 438; **Halifax v. Lordley**, 20 S.C.R. 505, at p. 512; and **Fairbanks v. Yarmouth**, 24 A.R. 273. In Ontario, however, a statute has been passed (3 Edw. VII., cap. 19, sec. 611) relieving the municipality from any such liability where there is a duty on the part of a railway or some other person to do so: **Holden v. Yarmouth**, 3 C.R.C. 74. Where a duty such as this is imposed the company must keep the bridge in such a state as not to injure anyone using it in a lawful manner: **Lay v. Midland Ry. Co.**, 34 L.T.N.S. 30, and where a child five years old while crossing a bridge placed his back against the hoardings and slid along until he came to ornamental work through which he fell upon the ground beneath and was injured, it was held that there was evidence upon which a jury might find that the bridge was not reasonably safe: *ibid.*; and see **Longmore v. Great Western Ry. Co.**, 19 C.B.N.S. 183; but the mere opinion of a witness that a bridge is not safe is not evidence sufficient for a jury: **Riggs v. Manchester, etc., Ry. Co.**, 12 Jur. N.S. 525;

and where a company were repairing a bridge and had barricaded the entrance and put up a "no thoroughfare" notice, the parents of a boy who went upon the bridge while it was light and fell through and was killed, were unable to recover damages: **Farrell v. G.T.R.**, 2 C.R.C. 249. Railway company was held liable under this section for injury resulting from dangerous subway. **Burrows v. G.T.R.**, 18 C.R.C. 183, 23 D.L.R. 173.

When rail
level not
obstruction.

265. Whenever the railway crosses any highway at rail level, whether the level of the highway remains undisturbed or is raised or lowered to conform to the grade of the railway, the top of the rail may, when the works are completed, unless otherwise directed by the Board, rise above or sink below the level of the highway to the extent of one inch without being deemed an obstruction. R.S., c. 37, s. 236.

Former section 236.

The corresponding section in the Act of 1888 was prohibitive in form requiring that the rail should not be more than one inch above or below the roadway. In its present form it merely provides that if not more than one inch above or below the road it shall not be deemed to be an obstruction. The inference, of course, is that if more than one inch above or below, an obstruction is created, but that is not so stated and it would probably be a question of fact in each case in which the limit of one inch was exceeded. As many ruts in the ordinary country road are more than one inch deep it is quite conceivable that a rail might be more than that below the level without furnishing evidence that it created such an obstruction as to amount to a nuisance upon the highway. Even under the former section it was decided that where an accident occurred at a crossing through a horse running away whereby the wagon was broken the mere fact that the rails protruded more than one inch did not furnish a cause of action unless in the opinion of the jury that had been the cause of the accident: **Thompson v. Great Western Ry. Co.**, 24 U.C.C.P. 429.

Altering the Level of a Street. Under a power to run along a highway a railway would have no right to alter the level of it: **Wood v. Carleton Branch Ry. Co.**, 14 N. B.R. 244.

Railway Company held liable for leaving an unnecessarily wide space between rail and planking. **Stevens v. C.P.R.**, 15 C.R.C. 28.

Efficient and non-negligent exercise of statutory powers, as to removal of ice and snow on the highway does not give rise to actionable nuisance: **Elliott v. Winnipeg Electric Ry. Co.**, 22 C.R.C. 258. Reversed by majority judgment of Supreme Court of Canada on the ground that the jury's verdict might be justified by the evidence which tended to show negligent exercise of the powers resulting in dangerous nuisance: **Elliott v. Winnipeg, etc., Ry. Co.** 23 C.R.C. 194.

Allowing ice to accumulate and remain along track so as to form a trap for an employee is actionable negligence of the railway company, even though it be on a highway at an intersection. **McEntee v. G.T.P. Ry. Co.**, 23 C.R.C. 269.

266. (1) The inclination of the ascent or descent, as the case may be, of any approach by which any highway is carried over or under any railway, or across it at rail level, shall not, unless the Board otherwise directs, be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach. Inclination
of approach.

(2) A good and sufficient fence at least four feet six inches in height from the surface of the approach or structure shall be made and maintained on each side of such approach, and of the structure connected with it. Fencing
approaches.
R.S., c. 37, s. 242. Am.

Former section 242, amended by inserting "and maintained" after "made" in the third line of sub-sec. 2.

Compare 8 Vict., cap. 20, secs. 49 and 50.

In England the inclination or slope varies from one foot in sixteen, to one foot in thirty according to the character of the road.

Approaches. This inclination is usually described as the "approach" to a crossing and is so used in the above section. In **Traversy v. Gloucester**, 15 O.R. 214, a case under the Ontario Municipal Act, "approaches" are defined by Armour, C.J., at page 216 as "such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road to the bridge and from the bridge to the road." This may easily be applied, *mutatis mutandis*, to approaches at level crossings.

Width of Approaches. In **Moggy v. C.P.R.**, 3 Man.

L.R. 209, it was said by Taylor, C.J., that there was no law requiring approaches to a bridge or level crossing to be of equal width with the rest of the road, but that they must be wide enough for the ordinary purposes of traffic having regard to the character of the highway; and this is apparently the law in the United States: Elliott on Railways, vol. 3, p. 1668; **Re North Manheim**, 36 A. & E. Ry. Cases 194; but where a company does not occupy the total width of the road with the approaches and leaves the rest in a dangerous condition it will be liable for any resultant damages: **Fairbanks v. Great Western Ry. Co.**, 35 U.C.R. 523, and, of course, if it neglects to fence any such approach as required by this section it will also be liable: **Holden v. Yarmouth**, 3 C.R.C. 74, and before the amendment to the Ontario Municipal Act already referred to, the municipality having charge of the roadway would be liable as well: **Toms v. Whitby**, 35 U.C.R. 195, 37 U.C.R. 100: See **Bird v. C.P.R. Co.**, 8 C.R.C. 314.

Repairing Approaches. Under the English Act, 8 Vict., cap. 20, sec. 46, a railway company is expressly required to repair the approach to a bridge: **North Staffordshire Ry. Co. v. Dale**, 8 El. & Bl. 836; **Great Eastern Ry. Co. v. Hackney**, 8 A.C. at pp. 699 and 700, where an intimation was given that the same rule applied in Ontario, though there was no express provision in the Act: **Mead v. Etobicoke**, 18 O.R. 438; **Fairbanks v. Yarmouth**, 24 A.R. 273, but these cases turned upon other points and cannot be treated as express authority for this proposition. In the case of approaches to a level crossing, it was held in Manitoba according to the head note in **Moggy v. C.P.R.**, *supra*, that a railway must repair the approaches to a level crossing, though the fact showed rather a failure to properly construct the crossing itself than a failure to subsequently repair its approaches. Taylor, C.J., there cited the case of **The People v. New York, etc., Ry. Co.**, 74 N.Y. 302, in support of the broad proposition hardly necessary for the decision of the case before him that a railway must keep the approaches to a level crossing in a proper state of repair. All the cases show, however, that such a duty to repair must be found in the wording of the statute or be a fair inference from its terms, and in **West Lancashire v. Lancashire, etc., Ry. Co.** (1903), 2 K.B. 394, the defendants were released from any liability to repair the approaches to a level crossing where no statutory duty to do so was laid upon them. By section 264, *ante*, there is manifestly a duty to maintain the "structure" by which a highway is carried over or under a railway, and it will be seen that in the latter part of section 266 a fence must

be made and maintained on each side of the **approach** and the **structure** connected with it, thus differentiating between the "structure" and its approach. If such distinction can properly be found in these sections it may be that a railway company is not now bound to repair the approaches to a crossing, but that such duty falls solely on the municipality. In **Palmer v. Michigan Central Ry. Co.**, 3 C.R.C. 194, Boyd, C., in speaking of approaches to a farm crossing, says: "While the presumption would be in the case of a public way that the approach is part of the bridge and to be kept in repair by the railway company that does not appear to obtain in the case of a private crossing such as this." It should be noted, of course, that this case was decided upon the terms of the Act of 1888. Some assistance may be found towards interpreting the word "structure" in the cases of **Adamson v. Rogers**, 26 S.C.R. 159, at page 174; **Coole v. Lovegrove** (1893), 2 Q.B. 44; **Venner v. McDonell** (1897), 1 Q.B. 421; **Elliott v. London County Council** (1899) 2 Q.B. 277; **London County Council v. Humphreys** (1894), 2 Q.B. 755; and **London County Council v. Pearce** (1892), 2 Q.B. 109.

267. (1) Sign boards at every highway crossed at rail level by any railway, shall be erected and maintained at each crossing, and shall have the words **Railway Crossing** painted on each side thereof in letters at least six inches in length.

Signboards
at level
crossings.

(2) In the province of Quebec such words shall be in both the English and the French languages. R.S., c. 37, s. 243.

In Quebec.

Former section 243. For penalty for breach see sections 444 and 445.

This is one of the precautions prescribed by statute which must be observed.

In **Soule v. Grand Trunk Ry. Co.**, 21 U.C.C.P., 308, the defendants were sued by a person whose horse ran into a signboard erected on the highway. It was held that the defendants would not be liable merely for putting the posts in the highway as the law allows them to do so; provided they place them in a reasonably proper manner with a due regard to all the surrounding circumstances, although the posts might necessarily obstruct the use of that part of the road upon which they are placed, nor would they necessarily be guilty of an indictable nuisance.

A railway company is not justified in placing highway signboards in such positions as to obstruct highway traffic; in the absence of complaints that these are so placed, the Board did not consider it necessary to adopt any regulations in respect thereto. 4th Annual Report (1909), p. 218.

The verdict of a jury finding that at a highway crossing absence of signboards was the cause of an accident, was upheld in **Pere Marquette v. Crouch**, 13 C.R.C. 247.

Drainage and Power, Mining and Irrigation Works.

Ditches,
drains and
flumes.

268. The company shall in constructing the railway make and maintain suitable water pipes, flumes, ditches and drains along each side of, and across and under the railway, to connect with water pipes, flumes, ditches, drains, drainage works and watercourses upon the lands through which the railway runs, so as to afford sufficient outlet to drain and carry off the water, or to convey the water supply, and so that the then natural, artificial, or existing drainage, or water supply, of the said lands, shall not be obstructed or impeded by the railway. R.S., c. 37, s. 250 (1). Am.

Former section 250 (1) amended by the insertion of the words "water pipes, flumes," in the second and fourth lines, the words "or to convey the water supply," in the seventh and eighth lines, and the words "or water supply" in the ninth line.

This section appeared for the first time in the Act of 1903. It and section 269 should be read with section 162, sub-sections (k), (l), (m), and (n), 163 and 164, **ante**. Taken together the effect is that by section 162 (k) a railway company may construct across, under or over any river, stream, watercourse or canal which it intersects or touches, such of the various works there enumerated as may be necessary for the proper working of the railway; by section 162 (l) it may divert temporarily or permanently the course of any river, stream or watercourse, or raise or sink the level thereof in order the more conveniently to carry the same over, under or by the side of the railway; by section 162 (m) the company may make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway; by section 162 (n) it may divert or alter the position of any waterpipe, sewer or drain.

Section 163 requires the company to restore as nearly as possible to its former state any river, stream, water-course waterpipe sewer or drain which it diverts or alters, or it shall put the same in such a state as not materially to impair its usefulness; and by section 164 the company, in the exercise of these or other powers, must do as little damage as possible and shall make full compensation in the manner herein and in the Special Act provided to all parties interested for all damage by them sustained by reason of the exercise of such powers. The method of acquiring lands and fixing compensation prescribed by the Act therefore applies to the diversion or obstruction of any stream, drain or water-course rendered necessary by the construction of the railway; and accordingly where a company desires to divert or obstruct, it must file the necessary plans and take all proceedings required in the case of interference with private or public lands, highways or other property; **Arthur v. G.T.R.**, 25 O.R. 37, 22 A.R. 89; and the mere fact that upon the general right of way plan approved by the authorities a proposed diversion is shown, would not authorise such diversion to the prejudice of individual rights unless such a course was expressly authorised by statute, or the person interested had been duly notified and received compensation for any private injury inflicted: **The Queen v. Wycombe Ry. Co.**, L.R. 2 Q.B. 310; but where a company has diverted a highway *ultra vires* but with a *bona fide* view to the convenience of the public, a Court of Equity will not compel it to replace the road if that will cause greater inconvenience than the unauthorised diversion, but will leave it open to the Attorney-General to proceed at law if so advised: **Attorney-General v. Ely, etc., Ry. Co.**, L.R. 6 Eq. 106, 4 Ch. App. 194.

But the provisions of sections 269 and 270 do not deprive the Courts of jurisdiction to grant an injunction in a proper case: **McCrimmon v. British Columbia, etc., Ry. Co.**, 19 C.R.C. 329, 24 D.L.R. 368.

A company would not be allowed to make a diversion (under the English Statute) merely because it would diminish the expense to which the company might be put under the terms of that statute (8 Vict., cap. 20, sec. 16); such a diversion must be actually necessary for the construction of the railway: **Pugh v. Golden Valley Ry. Co.**, 12 Ch. D. 274. In **Graham v. Northern Ry. Co.**, 10 Gr. 259, it was decided upon principles somewhat similar to those invoked in **Attorney-General v. Ely**, that the mere fact that a riparian proprietor had recovered damages

at law for an interference with a stream would not entitle him to an injunction upon an appeal to the discretionary jurisdiction of a Court of Equity where the damages were merely nominal and the balance of convenience was greatly in favour of the company: see also **Poudrette v. Ontario, etc., Ry. Co.**, 11 L.N. 130. Where a company in an attempt to prevent an interference with a drain or watercourse negligently or improperly constructs a ditch, drain or culvert so that damage is done to other landowners, an action will lie at common law based upon this negligent act, and the injured party is not compelled to seek compensation under the statute: **Vanhorn v. G.T.R.**, 9 U.C.C.P. 264; **Anderson v. Great Western Ry. Co.**, 11 U.C.R. 126; **McCrimmon v. British, etc., Ry. Co.**, 19 C.R. C. 329, 24 D.L.R. 368; Abbott Railway Law of Canada, 240, 241, 242, and a similar result has been arrived at in England: **Lawrence v. Great Northern Ry. Co.**, 16 Q.B. 643; see also **Simoneau v. The Queen**, 2 Ex. C.R. 391; **Morin v. The Queen**, 2 Ex. C.R. 396, 20 S.C.R. 515, and even where defendants might not be bound to construct a ditch to carry off surface water, yet if they assume to do so and construct it so carelessly that the flow is impeded and damage results, the plaintiff will be entitled to recover: **Utter v. Great Western Ry. Co.**, 17 U.C.R. 392; and where a drain was so negligently constructed that water flooded a highway, a municipality charged with its repair was permitted to recover for the special injury inflicted: **Sarnia v. Great Western Ry. Co.**, 17 U.C.R. 65. A declaration that defendants negligently, wrongfully and injuriously placed earth in a ditch so as to obstruct it, was upheld in **Alton v. Hamilton, etc., Ry. Co.**, 13 U.C.R. 595. Where defendants constructed a culvert too small to carry off water brought down by drains made before the railway passed through, it was held liable for damages resulting from an overflow: **Carron v. Great Western Ry. Co.**, 14 U.C.R. 192. In such a case, also, the Board could grant relief by ordering the necessary improvements: **Denholm v. Guelph, etc., Ry. Co.**, 17 C.R.C. 318.

Where no negligence or improper construction is shown and the damage is due solely to a reasonable exercise of the powers conferred upon the railway company, the owner of adjoining lands cannot recover damages as such an injury should have been foreseen and compensation for it claimed under the statute when the railway was constructed: **L'Esperance v. Great Western Ry. Co.**, 14 U.C.R. 173; and see **Nichol v. Canada Southern Ry. Co.**, 40 U.C.R. 583; **Dept. of Agriculture for Canada**

v. G.T.R., 23 C.R.C. 77; and a purchaser of lands injured by the backing up of water owing to a railway embankment, cannot recover damages for what should have been the subject of a claim for compensation at the time the railway was built: **Knapp v. Great Western Ry. Co.**, 6 U.C.C.P. 187; **Wallace v. G.T.R.**, 16 U.C.R. 551; **Dept. of Agriculture for Canada v. G.T.R.**, *supra*; but it is not assumed merely because a person has a statutory right to carry on irrigation works that he may do so in a manner to prejudice the rights of others, such a right must clearly appear from the provisions of the statute: **C.P.R. v. Parke** (1899), A.C. 535, reversing 6 B.C.R. 6; **Tolton v. C.P.R.**, 22 O.R. 204; and where the company having no authority to divert a watercourse, claimed to have agreed with the previous owner to do so and to have paid him compensation therefor, it was held that under the Ontario Registry Act the easement to divert thereby created would not avail as against a subsequent purchaser without notice: **Tolton v. C.P.R.**, *supra*. Where a diversion is made without complying with the terms of the statute authorising it, the owner is entitled to damages in an action based upon the permanent injury done him: **Arthur v. G.T.R.**, 25 O.R. 37, 22 A.R. 89. In the Divisional Court it was said that it was the original diversion and not the resulting damages which gave the cause of action, and therefore it would appear that the limitation of time for bringing an action under section 391, *infra*, would run from the date of the diversion, but though such cases as **Knapp v. Great Western Ry. Co.**, 6 U.C.C.P. 187, and **Glen v. G.T.R.**, 2 P.R. 377, would seem to bear this out, the decisions in **McGillivray v. Great Western Ry. Co.**, 25 U.C.R. 69, and **Carron v. Great Western Ry. Co.**, 14 U.C.R. 192, to lead to the conclusion that time begins to run from the date of the damage done by the overflow, although apparently under those cases only such damages can be recovered as have been suffered during the period of that limitation.

In **LeMay v. C.P.R.**, the Court of Review (De Lormier, Charbonneau & Dunlop, J.J.) 15 December, 1909, decided that the claim of a landowner for damages to his property by flooding owing to the insufficiency of a culvert under the railway was continuous in its nature and was not prescribed to one year under section 306 (now 391) of the Railway Act, but that the prescription of two years under section 2,261 Civil Code, was the law applicable to the plaintiff's claim and the plaintiff recovered damages for twenty-three months elapsed from the date of a former judgment in his favor for previous damage in

December, 1907, to the date of judgment in the present action.

In **McCrimmon v. British, etc., Ry. Co.**, 19 C.R.C. 329, 24 D.L.R. 368, it was decided by the British Columbia Court of Appeal, following **McGillivray v. Great Western Ry. Co.**, that the negligent construction gave a continuing cause of action arising from time to time as damage was done, and that time did not begin to run until after one year after the doing or committing of such damage ceased. The one year period has now been extended by amendment to two years. But where a railway company is illegally acting, the trespass has been held not to be construction or operation, and section 391 would not therefor apply. **Gauthier v. C.N.R.**; **Dagenais v. C.N.R.**, 19 C.R.C. 144; 17 D.L.R. 193; and see **Carr v. C.P.R.**, 14 C.R.C. 40; **Niles v. G.T.R.**, 15 C.R.C. 73.

Generally speaking, a person is not liable for obstructing the flow of surface water as distinguished from water flowing in a defined channel: **Crewson v. G.T.R.**, 27 U.C.R. 68; **Nichol v. Canada Southern Ry. Co.**, 40 U.C.R. 583; but where a landowner has arranged for the disposal of surface water by means of artificial drains and these are obstructed by the railway company, the proceedings for arbitration and expropriation must be invoked and compensation made by the latter for all interference with such drains: **Arthur v. G.T.R.**, *supra*. In this case it has been held by the Court of Appeal that if water precipitated from the clouds in the form of rain or snow forms for itself a visible channel and is of sufficient volume to be serviceable to the persons through or along whose land it flows, it is a watercourse, and for its diversion an action will lie. In Manitoba a watercourse is said to consist of bed, banks and water, and while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground: **Wilton v. Murray**, 12 Man. L.R. 35. The general subject of what constitutes "surface water" as distinguished from a watercourse is discussed in **Ostrom v. Sills**, 24 A.R. 526, 28 S.C.R. 485. It is laid down by the Court of Appeal, and affirmed by the Supreme Court, that an occupant or owner has no right to drain into his neighbors' land the surface water from his own land not flowing in a defined channel, see also on this subject **Young v. Tucker**, 26 A.R. 162; **Hamelin v. Bannerman**, 31 S.C.R. 534; **Ward v. Grenville**, 32 S.C.R. 510. Section 268 will, of course, render it more than ever necessary that a railway company should take care

of all water brought down upon its land by ditches or drains at the time the railway is constructed. But when the railway is constructed before the drain it does not apply. **Langlais v. G.T.R.**, 26 Q.R., 26 S.C. 511. Where land is injured by the unlawful flow of water from another's land, the owner may erect works necessary to keep it off and is liable for damages neither to the person from whose lands such water flows nor to anyone to whose land it is diverted by reason of his preventive measures: **C.P.R. v. McBryan**, 5 B.C.R. 187, 6 B.C.R. 136, 29 S.C.R. 359; **Ostrom v. Sills**, *supra*; **Hornby v. New Westminster, etc., Ry. Co.**, 35 Can. L.J. 653, 6 B.C.R. 588; but where the railway company instead of merely keeping water off its own lands, constructs ditches so as to convey it to another's they were held, in Quebec, to be liable for resulting damages: **G.T.R. v. Miville**, 14 L.C.R. 469.

The execution and delivery to a railway company of a conveyance of right of way containing a general release clause to the effect that the purchase price includes compensation for all damages which may be sustained by reason of the exercise upon the lands conveyed of the powers of the railway company, does not relieve the company from the obligations imposed upon it by section 268: **Denholm v. Guelph, etc., Ry. Co.**, 17 C.R.C. 318.

Where a municipality, acting within its powers, passes a by-law providing for its drainage works, including improvements in culverts under the railway, and including the assessment against the railway company, the only matter open to the Board is to pass upon the character of the work on the railway property having regard to its sufficiency for railway operation and the safety of the travelling public. Ordinarily the Board does not interfere with an assessment under a valid by-law, and probably has no jurisdiction to do so. **Township of Humberstone v. G.T.R.**, 17 C.R.C. 316.

269. (1) Whenever,—

- (a) any lands are injuriously affected by reason of the drainage upon, along, across, or under the railway being insufficient to drain and carry off the water from such lands; or,
- (b) any municipality or landowner desires to obtain means of drainage, or the right to lay water pipes or other pipes, temporarily or permanently, through, along, upon, across or under the railway or any works or land of the company; or,

If drainage
insufficient.

Or munic-
pality
desires.

Or company
desires.

- (c) the railway company desires to obtain means of drainage, or the right to lay water pipes or other pipes, temporary or permanently, through, along, upon, across or under any lands adjoining or near the railway;

Board may
order or
permit
drainage
or laying
of pipes.

the Board may, upon the application or complaint of the municipality or landowner, or of the company, order or permit the company to construct such drainage or lay such pipes, and may require the applicant to submit to the Board a plan and profile of the portion of the railway or lands to be affected, or may direct an inspecting engineer, or such other person as it deems advisable to appoint, to inspect the locality in question, and, if expedient, there hold an inquiry as to the necessity or requirements for such drainage or pipes, and to make a full report thereon to the Board.

Terms and
conditions.

(2) The Board may upon such report, or in its discretion, order how, where, when, by whom, and upon what terms and conditions, such drainage may be effected, or pipes laid, constructed and maintained, having due regard to all proper interests, and may fix the compensation, if any, which should be paid to any owner injuriously affected or may direct the compensation, if any, to be determined under the arbitration sections of this Act.

Order not
needed where
consent, etc.

(3) An order of the Board shall not be required in the cases in which water pipes or other pipes are to be laid or maintained under the railway, with the consent of the railway company in accordance with the general regulations, plans or specifications adopted or approved by the Board for such purposes. R.S., c. 37, s. 250 (2)-(3); 1911, c. 22, s. 8. Am.

Former section 250, sub-sections (2) and (3) amended by 1-2 Geo. V., cap. 22, sec. 8, by adding sub-section (3), and further amended by the insertion in sub-section (1) (c) of the words "or of the company," in the 7th line, the words "or permit" in the 7th and 8th lines, and the word "such" in the 9th line, and by adding to sub-section (2) all the words following "interests" in the 5th line.

No compensation is given to a railway company for wires or pipes crossing the railway: **Maritime Telegraph Co. v. D.A.R.; Baird v. C.P.R.**, 20 C.R.C. 213.

The Board has no jurisdiction to compel a railway company to construct works merely for a landowner's benefit or to prevent damage by flooding for which the railway is not responsible. **Trites v. C.P.R.**, 21 C.R.C. 1.

The Board has jurisdiction to authorise the laying of a gas main under railway tracks, to fix compensation for the privilege and impose conditions as to indemnity, etc. **Montreal v. G.T.R.**, 17 C.R.C. 330.

Applicant for leave to carry pipes across railway yard must assume responsibility for all damage that may occur under any circumstance, by reason of the presence of the pipes, even when caused by negligence of railway employees. **Winnipeg v. C.P.R.**, 23 C.R.C. 75.

This section embodies the provisions of section 14 of the Act of 1888, but with considerable alterations and additions. In its original form it applied to **streets** as well as drains.

The provision for opening streets across railways in section 14 of the Act of 1888 next appeared in sub-section 186 of the Act of 1903, next in section 237 of the Act of 1906, and then in section 256 of the present Act, as "to constructing a highway" "across an existing railway." The cases since decided are collected in the notes to sec. 256, **ante**.

The scope of the section provides a summary method of executing drainage work under the authority of the Board and provides relief in such cases as those where a municipality desires to carry out such works, but finds itself blocked by a Dominion Railway, which, but for the provisions of section 270, **infra**, cannot be affected by Provincial Drainage Acts or works undertaken under the authority of such Acts which will have the effect of interfering with the structure of the railway. It has been decided in **Miller v. G.T.R.**, 45 U.C.R. 222, and **McCrimmon v. Yarmouth**, 27 A.R. 636, that such statutes do not apply to railways subject to the jurisdiction of the Federal Parliament; hence the necessity for such relief. Where, however, Provincial Acts are not designed to interfere with the permanent structure of a Dominion railway, but only provide a method of restoring drains upon its lands to their original condition by cleaning them out, such legislation is binding upon the railway and the cost of doing such work may be levied upon it by a municipality: **C.P.R. v. Notre Dame de Bonsécours**, Q.R. 7 Q.B. 121, (1899), A.C. 367; and such a railway company in Quebec is not only subject to the provisions of provincial and municipal legislation respecting the maintenance of its ditches or

drains, but is entitled to any corresponding benefits conferred upon the owners of such ditches by the Quebec Civil Code: **Duhaime v. G.T.R.**, Q.R. 16 S.C. 121. This section does not purport to render such companies liable to provincial legislation to any greater extent than heretofore, but merely enables the Board to facilitate the carrying out of any drainage scheme inaugurated under such legislation by exercising the powers conferred by this section. It will be seen, however, that by the next section a step in advance has been taken, and an attempt has been made to give provincial legislatures authority over Canadian railways, so far as the subject of drainage works is concerned.

This legislation was first enacted in 1900, by 63-64 Vict., cap. 23 (D.), but was limited to conferring power upon the Railway Committee to order the company to construct such drainage works as the Committee might think necessary for the due execution, so far as the railway lands were concerned, of the proposed drainage scheme. The new section goes further still and enacts that where the Board has made no order under the preceding section, and the railway refuses to voluntarily construct the necessary works on its lands, the authors of the drainage scheme may construct it upon railway lands under the authority of and in the manner prescribed by the provincial statute, subject, however, to the approval of the Board. In so far as the Dominion Parliament has thus delegated its functions to the Provincial Legislatures, a principle, which appears to be entirely novel under the B.N.A. Act, has been introduced; namely, the delegation to the Provinces of legislative powers conferred exclusively upon the Dominion by the statute in question. It remains to be seen, whether such a delegation of legislative functions to another, but in no sense a subordinate legislative body, is within the power of the Federal Parliament. It would appear to be essentially different from the delegation of limited powers to one of its own officers or subordinate bodies, and resembles rather the transfer of its jurisdiction to an alien sovereign power such as a foreign country, or to some other colony which exercises the functions of the sovereign within a more or less restricted legislative sphere. The constitutional aspect of this section may yet create an interesting discussion, but there are no decisions as yet.

As to damages for obstructing drains, see **Knill v. G.T.R.**, 8 O.W.R. 870 and sec. 164, *ante*. The compensation allowed does not include damages for the subsequent.

obstruction of the drain, **G.T.R. v. Langlais**, Q.R. 14 K.B. 173.

270. (1) Whenever by virtue of any Act of any province through which the railway runs, proceedings may be had or taken by any municipality or landowner for any drainage, or drainage works, upon and across the property of any other landowner in such province, the like proceedings may, at the option of such municipality or landowner, be had or taken by such municipality or landowner for drainage, or drainage works, upon and across the railway and lands of the company, in the place of the proceedings before the Board in the last preceding section provided.

Drainage
proceedings
under
Provincial
Acts.

(2) In case of any such proceedings, the drainage laws of the province shall, subject to any previous order or direction of the Board made or given with respect to drainage of the same lands, apply to the lands of the company upon or across which such drainage is required, to the same extent as to the lands of any landowner of such province: Provided that the company shall have the option of constructing the portion of any drain, or drainage work, required to be constructed upon, along, under or across its railway or lands.

Provincial
laws to
apply.

Option of
company.

(3) In the event of the company not exercising such option, and completing such work within a reasonable time, and without any unnecessary delay, such work may be constructed or completed in the same manner as any other portions of such work are provided under the laws of such province to be constructed.

If option not
exercised.

(4) Notwithstanding anything in this section contained, no drainage works shall be constructed or reconstructed upon, along, under or across the railway or lands of the company until the character of such works, or the specifications or plans thereof, have been first submitted to and approved of by the Board.

Approval of
Board.

(5) The proportion of the cost of the drain, or drainage works, across or upon the railway, to be borne by the company, shall, in all such cases, be based upon the

Costs.

increase of cost of such work caused by the construction and operation of the railway. R.S., c. 37, s. 251.

Former section 251.

Sub-section 5, so far as the Province of Ontario was concerned, applied to Dominion railways brought within the provisions of provincial Drainage Acts, a principle less favourable to the company than existed in the case of railways which were subject only to the jurisdiction of the Province. See sections 9 and 10 of the Railway Ditches and Watercourses Act, R.S.O. 1897, Cap. 286. This Act was repealed by R.S.O. 1914, schedule A, and similar provisions do not appear in R.S.O., cap. 260.

The jurisdiction of the Board to deal with applications affecting drainage across railway lands is limited under this section to approving the character and specifications of the work on the railway company's property. The Board cannot modify in any respect any drainage scheme or decide as to its sufficiency, or the propriety of locating culverts on the company's right of way at any particular point. No application to the Board should be made until all the proceedings under the Provincial Drainage Acts have been exhausted; so held by the Board, upon an application by the municipality of the Township of Tilbury East for an order approving of the Mallott drain being carried across the lands of the Canadian Pacific Railway Company. **Re Drainage Applications** (Ontario) 17th January, 1910.

Sub-section 4 does not give the railway company a final appeal to the Board against the whole drainage scheme. The Board has nothing to do with the general drainage scheme, with the apportionment or distribution of the cost of the work, or the fairness or legality of the proceedings, or the validity of the by-law. All that need be submitted to the Board for approval, is the estimate of the engineer of the volume of water that will probably pass through the culvert or opening through the drainage lands, and the proposed size of the opening. This should be in the form of a statutory declaration; and the proposed mode of carrying the railway over the opening or culvert, with all proper plans of that work should accompany the application: **Township of Tilbury v. G.T.R.**, 16 C.R.C. 247, approving the ruling of the late Chief Commissioner, Hon. J. P. Mabey, delivered by him on January 17th, 1910: *ibid.* at p. 249.

In **Re Labute Award Drain**, the Board made an order allowing construction of a drain along (not across) the

railway right of way but reserved the right of the railway to object in other cases that orders allowing this use of the right of way should not be made. Order B.R.C. No. 25997, dated 7th April, 1917.

271. (1) When any person having authority to create, develop, enlarge or change any water-power, or any electrical or power development by means of water, or to develop and operate mineral claims or mines, **or to use water for irrigation purposes**, desires for any such purpose to carry any canal, tunnel, flume pipe, ditch or wire across, over or under any railway, and is unable to agree with the railway company as to the terms and conditions upon which the same may be so carried over, under or across the said railway, an application may be made to the Board for leave to construct the necessary works.

Power,
mining and
irrigation
works.

Application
to Board.

(2) Upon such application the applicant shall submit to the Board a plan and profile of the railway at the point where it is desired to make such crossing, and a plan or plans showing the proposed method of carrying such canal, tunnel, flume pipe, ditch or wire across, over or under the said railway, and such other plans, drawings and specifications as the Board in any case or by any regulation requires.

Plan and
profile.

(3) The Board may, by order, grant such application on such terms and conditions as to protection and safety, payment of compensation or otherwise, as it deems just and proper, may change the plans, profiles, drawings and specifications so submitted, and fix the place and mode of crossing and may give directions as to the method in which the works are to be constructed and as to supervision of the construction of the works and the maintenance thereof, and order that detailed plans, drawings and specifications of any works, structures, equipment or appliances required shall before construction or installation be submitted to and approved by the Board. R.S., c. 37, s. 249. Am.

Terms of
order.

Former section 249, amended by the insertion of the words "or to use water for irrigation purposes," in the 4th and 5th lines. The section first appeared in the Act of 1906.

No provincial legislation can authorise any works the effect of which is to interfere with the structure of the railway. **C.P.R. v. Notre Dame de Bonsécours** (1899), A.C. 367; **C.P.R. v. The King**, 39 S.C.R. 476, 7 C.R.C. 176; **Madden v. Nelson & Fort Sheppard Ry. Co.** (1899), A.C. 626.

In **C.P.R. v. Kaministiquia Power Co.**, 6 C.R.C. 160, the terms and conditions on which power wire crossings are authorised by the Board are discussed.

See also **Bell Telephone Co. v. Nipissing Power Co.**, 9 C.R.C. 473.

Farm Crossings.

Farm
crossings.

272. (1) Every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway for farm purposes.

Live Stock.

(2) Live stock, in using such crossings, when at rail level, shall be in charge of some competent person, who shall take all reasonable care and precaution to avoid accidents. R.S., c. 37, s. 252. Am.

Former section 252, amended by the insertion of the words, "when at rail level" after the word crossings in the first line of sub-sec. (2).

The company is not obliged or authorized to go upon the adjoining land of the owner to repair the crossing: **Palmer v. Michigan Central Ry. Co.**, 7 O.L.R. 87, 3 C.R.C. 194.

Where an undercrossing was constructed and maintained by a railway company for over twenty years after the construction of the railway, held (1) that the facts showed that it was part of the consideration for the right of way and should be maintained, and (2) that an easement had been established by continuous user as of right. *Semble*, that the doctrine of presumption of a lost grant could be applied: **Leslie v. Pere Marquette Ry. Co.**, 13 C.R.C. 219, affirmed by a Divisional Court on the ground that an easement had been established, 13 C.R.C. 228.

There is no right to a farm crossing unless reserved by the deed or expressly given by statute: **Hounscome v. Vancouver Power Co.**, 15 C.R.C. 69; 9 D.L.R. 823, affirmed 19 D.L.R. 200.

When a company during construction provides crossings which it recognizes as being necessary, it cannot afterwards abolish one as being useless: **Saindon v. Temiscouata Ry. Co.**, 14 C.R.C. 326. The Board has no power to declare that an existing farm crossing is useless, *ibid*.

Similar provisions of Quebec Railway Act, 43-44 Vict., cap. 43, sec. 16, held to apply to railway constructed before Act was passed. Interference with crossing by widening right of way entitles land owner to damages: **Drolet v. C.P.R.**, 16 C.R.C. 280. There was no right to a farm crossing prior to the Railway Act of 1888, unless reserved in conveyance of right of way. The right to a farm crossing is lost upon a complete severance of title to the land on one side from that on the other side of the railway: **Hillhouse v. C.P.R.**, 17 C.R.C. 427, 20 D.L.R. 907. Lapse of time without demand for a farm crossing does not of itself extinguish the statutory right to it: **Harris v. G.N.Ry. Co.**, 21 C.R.C. 193.

Cattle pass (not an undercrossing) ordered where railway carried on high embankment and over crossing for cattle would be inconvenient: **Lalonde v. C.N.O. Ry. Co.**, 21 C.R.C. 194. Severance of title to parcels on either side of the railway extinguishes the right to a farm crossing, and the right is not revived by subsequent acquisition of both parcels by the same owner. **O'Brien Bros. v. C.P.R.**, 21 C.R.C. 197.

273. (1) The Board may, upon the application of any landowner, order the company to provide and construct a suitable farm crossing across the railway, wherever in any case the Board deems it necessary for the proper enjoyment of his land, and safe in the public interest.

Necessary crossings may be ordered by Board.

(2) The Board may order and direct how, when, where, by whom, and upon what terms and conditions, such farm crossing shall be constructed and maintained. R.S., c. 37, s. 253. Am.

Terms and conditions.

Former section 253, amended by the omission of the words "on either side of the railway" between the words "land" and "and" in the fifth line of sub-sec. (1).

Farm Crossings Defined. Though this term has been employed in Railway Acts since 14 & 15 Vict., cap. 51, it has never been defined by legislation. In **Reist v. Grand Trunk R.W. Co.**, 6 U.C.C.P. 421, at p. 423, Draper, C.J.,

says: "the word may include a passage across and upon a railway itself—a crossing at grade or a bridge over—or a tunnel under the railway," and in **Burke v. Grand Trunk R.W. Co.**, *ibid.*, at p. 486, he repeats this definition.

Anglin, J., speaks of a farm crossing in **T.H. & B. Ry. Co. v. Simpson Brick Co.**, 17 O.L.R. 632, 8 C.R.C. 464, at p. 470, as follows: "Farm Crossings" appears to be a term used in the statute in contradistinction to "highway crossings," and intended to cover all private rights of crossing to be enjoyed by "persons across whose lands the railway is carried," whatever may be the character of such lands or the use to which they are put. And see **New v. T.H. & B. Ry. Co.**, 8 C.R.C. 50.

Under section 273 the Board may order an under crossing in addition to the purchase money paid for the land taken and damages: **In Re Cockerline and Guelph & Goderich Railway Company**, 5 Can. Ry. Cas. 313, approving **Reist v. Grand Trunk Railway Company**. The opposite view was held by Meredith, C.J., in the case of **Re Armstrong and James Bay Railway Company**, 12 O.L.R. 137; 38 S.C.R. 511, (1909), A.C. 624, 5 Can. Ry. Cas. 306, 6 Can. Ry. Cas. 196, 10 Can. Ry. Cas. 1, and this case was affirmed on an appeal to the Privy Council. It must not be taken as a binding authority on this point, however, which was not necessarily considered in dealing with the appeal.

And see **Lusty v. Pere Marquette Ry. Co.**, 21 C.R.C. 93, where it was held that if at the time of the sale of the right of way the vendors were legally entitled to a crossing, the provision in the purchase deed that the consideration is to include full compensation and indemnity for all damages or injury to the property by reason of the railway, does not constitute a relinquishment of the right to a farm crossing.

When Right to Crossing Arises. There is at common law no right to a crossing upon a severance of the land, and unless given by statute the owner cannot require it at the hands of a railway company, nor, before the passing of section 222, could the latter force it upon the owner in mitigation of damages for a severance, and consequently where no statutory provision for a crossing exists, full compensation for the severance of the land should be granted: **Vezina v. The Queen**, 17 S.C.R. 1; **Guay v. The Queen**, *ibid.* 30. The case of **Canada Southern R.W. Co., v. Clouse**, 13 S.C.R. 139, was formerly regarded as an authority to the contrary, but in **Ontario Lands & Oil Co.**

v. Canada Southern R.W. Co., 1 O.L.R. 215, 1 Can. Ry. Cas. 17, it was held by Meredith, J., that the **Clouse Case** was in effect overruled by the **Vezina and Guay Cases**, and that **Brown v. Toronto, etc., R.W. Co.**, 26 U.C.C.P., 206, holding that there was no common law right to crossing, has been approved and followed in preference to **Canada Southern R.W. Co. v. Clouse**. The earlier legislation respecting farm crossings was all considered in **Ontario Lands & Oil Co. v. Canada Southern R.W. Co.**, ante, and it was there decided that prior to the statute of 1888, there had been no statutable obligation on a railway company to provide and maintain farm crossings and that as that statute was not retroactive, no one whose lands had been severed prior to 1888 could demand a crossing. It is to be observed that by section 273 of the present Act, the Board may order the erection of farm crossings wherever it deems it necessary for the proper enjoyment of the land so that there is now a means whereby a crossing in the nature of a farm crossing may be obtained, even though the right to one did not previously exist. But in order to entitle a land owner to a farm crossing at the expense of a railway company, the applicant must be a person "across whose lands the railway is carried." And so where the applicant obtained a patent of lands on both sides of a railway subsequent in date to the company's patent of the right of way, he was ordered to pay the cost of a crossing: **Wimbles v. G.T.P. Ry. Co.**, 21 C.R.C. 191.

A question sometimes comes up whether a purchaser of a portion of lands severed by the railway can compel the company to give him a crossing for the piece he has bought, when the owner of the remainder of the land continues in the enjoyment of the crossing that formerly served for both parcels. In **Grand Trunk R.W. Co. v. Huard**, Q.R. 1 Q.B. 501, it was held that the railway company was governed in the matter of crossings by the Railway Clauses Act, 14 & 15 Vict., cap. 51, which was incorporated in its charter, 16 Vict., c. 37, and that under that Act it was its duty to construct crossings for each lot of land traversed by the railway, whether or not such lots were sub-divisions of lands originally expropriated, and that the compensation made at the time of expropriation of the original lot could not be regarded as sufficient indemnity for a lack of crossings upon a future sub-division of the lots. This subject is dealt with in Abbott's Railway Law, pp. 256, 257, 258, and he arrives at the conclusion that crossings must be given upon a sub-division of the lands, but the decision in **Ontario Lands & Oil Co.**

v. Canada Southern R.W. Co., 1 Can. Ry. Cas. 17, rendered five years after the publication of this work lays down the opposite rule and the law laid down in this case would probably be accepted in provinces other than Quebec. It has been followed in Ontario in **Carew v. Grand Trunk R.W. Co.**, 5 O.L.R. 653, 2 Can. Ry. Cas. 241.

According to later decisions, where a crossing has been granted by reason of the severance of the owner's land, and he afterwards sells the land on either side of the track to different purchasers, the right to the crossing is not necessarily lost. The benefit of a covenant for a crossing with the vendors, their heirs, executors and administrators, was held to extend to the assignees of the vendors, and the lessees of the assignees, even though the original owners had sold land on each side of the track to different persons. But in this case the original owners expressly reserved and conveyed in the deeds to the purchasers the right of crossing and a right of way over one parcel to a street when conveying the other parcel: **T. H. & B. Ry. Co. v. Simpson Brick Co.**, 8 C.R.C. 464, 17 O.L.R. 632. But where the original owner severs his land without reserving or conveying the right to a crossing, the right is lost, and the subsequent purchaser of both parcels from different vendors is not entitled to a crossing except under sec. 273, and upon terms: **O'Brien v. C.P.R.**, 21 C.R.C. 197.

In England crossings must be supplied as the lands become more and more sub-divided: **United Land Co. v. Great Eastern R.W. Co.**, 10 Ch. App. 586, but the wording of the English statute (8 Vict., cap. 20, sec. 68) is entirely different from ours, and fully justifies a different conclusion. Where land has been conveyed so that the purchaser cannot get out without crossing railway lands, a way of necessity was offered by the Railway Company, but was refused by plaintiffs in **Ontario Lands & Oil Co. v. Canada Southern R.W. Co.**, and it was not decided by Meredith, J., whether plaintiffs would be legally entitled to it. As the purchaser did not acquire his land from the railway company, but from another vendor, it is difficult to see how he could claim a way of necessity. Generally such a right is only preserved where one person conveys to another land which the purchaser has no means of reaching except over the vendor's property: **Wilkes v. Greenway**, 6 T.L.R. 449; **Ecroyd v. Coulthard** (1897), 2 Ch. 554; **Grand Trunk R.W. Co. v. Valliear**, 2 Can. Ry. Cas. 245, 7 O.L.R. 364, 3 Can. Ry. Cas. 399, and see notes on "Farm Crossings," 3 Can. Ry. Cas., pp.

202 and 203. Where an owner sold land to a company thus severing his own property and reserved no right of way across, it was held that he had no right to a way of necessity because he could pass from one portion of his lands to another by means of a highway adjoining them both: **Carroll v. Great Western R.W. Co.**, 14 U.C.R. 614.

The Board has jurisdiction to order a farm crossing at the expense of the Railway, even though the applicant's predecessor had no right of crossing. The Chief Commissioner (Killam) dissented, holding that section 252 (now 272), was applicable only to cases in which the railway had been carried across a person's land since the Act of 1888; that the applicant had no legal right to a crossing, and that it could be granted by the Board only under the discretionary power given by sec. 253, and that under the circumstances the applicant should pay the cost of constructing such a crossing. **Wright v. Michigan Central R.W. Co.**, 6 Can. Ry. Cas 133; but see **New v. Toronto, Hamilton & Buffalo Ry. Co.**, 8 Can. Ry. Cas., 50, *infra*.

Where at the time of the conveyance of the right of way, there was no legal liability on the part of the company to provide a crossing, and full compensation was paid, the subsequent passing of a statute providing for farm crossings, did not entitle the land owner to a crossing: **Hounsome v. Vancouver Power Co.**, 15 C.R.C. 69, 9 D.L.R. 823, affirmed 19 D.L.R. 200. But where compensation has been agreed upon and paid, and level crossings have been provided, and the owner subsequently applies for a cattle pass, the Board will order a cattle pass, in a proper case, upon the compensation being returned, and the quantum thereof determined *de novo*: **Wilson Bros. v. C.N.O. Ry. Co.**, 16 C.R.C. 270: **Ray v. C.N.R.**, 16 C.R.C. 276.

Where a crossing has been constructed before the passing of an Act providing for farm crossings, the passing of such an Act makes the right to the crossing absolute in the original owner: **Drolet v. C.P.R.**, 16 C.R.C. 280, Q.R. 44, S.C. 86. But the right to a crossing constructed before 1888, and under agreement, does not pass to the assigns of the land owner, except by express grant. **Midland Ry. Co. v. Gribble** (1895) 2 Ch. 129, 827; **T.H. & B. Ry. Co. v. Simpson Brick Co.**; 17 O.L.R. 632, 8 C.R.C. 464; **Hillhouse, Hume & Booth v. C.P.R.**, 17 C.R.C. 427, 20 D.L.R. 907. And see **Mills v. Hopkins**, 6 U.C.C.P. 138.

Grant of Crossing Over Railway. Even before the Act of 1888, when farm crossings were first provided for,

it was competent for a railway company to grant a crossing to a vendor of land for right of way, as part of the consideration for the sale: **Ontario, etc., Ry. Co. v. Philbrick**, 12 S.C.R. 288; **McKenzie v. G.T.R.**, **Dickie v. G.T.R.**, 7 C.R.C. 47, 14 O.L.R. 671. And since 1888, a reservation or a grant of a crossing in the conveyance to a railway company has been held to be good and *intra vires* of the company: **T.H. & B. Ry. Co. v Simpson Brick Co.**, 8 C.R.C. 464, 17 O.L.R. 632.

And where the owner of land on both sides of a railway has enjoyed a crossing for many years as of right, and the company have acquiesced and regularly repaired the crossing, such an agreement will be presumed, and the company will be restrained from removing the crossing: **McKenzie v. G.T.R.**; **Dickie v. G.T.R.**, 7 C.R.C. 47, 14 O.L.R. 671. Acquiescence for a number of years by a railway company may be evidence of the legal right to a crossing: **Saindon v. Temiscouata Ry. Co.**, 14 C.R.C. 326, Q.R. 41, S.C. 337. But the company will not be bound by an agreement for a crossing over its land made on its behalf by its solicitors: **Doran v. Great Western R.W. Co.**, 14 U.C.R. 403; **Wood v. Hamilton, etc., R.W. Co.**, 25 Gr. 135, or by its engineer: **Cameron v. Wellington, etc., R.W. Co.**, 28 Gr. 327.

Quaere as to whether a railway company can grant such an easement when the tracks do not sever the lands of one owner; see **Mulliner v. Midland R.W. Co.**, 11 Ch. D. 611; **Great Western R.W. Co. v. Solihull**, 86 L.T. 852; 18 T.L.R. 707. In such case right to a level crossing or undercrossing over a railway cannot be acquired by prescription, because such prescription rests upon the presumption of a lost grant and the railway company would have no power to make any such grant: **Guthrie v. Canadian Pacific R.W. Co.**, 27 A.R. 64, 1 C.R.C. 1; **Canadian Pacific Ry. Co. v. Guthrie**, 31 S.C.R. 155; 1 C.R.C. 9; **Grand Trunk R.W. Co. v. Valliear**, 7 O.L.R. 364, 3 Can. Ry. Cas 399, reversing **Boyd, C.**, reported 2 *ibid.*, 245. The right to a farm crossing depends upon the ownership of lands on both sides of the railway, and so the owner of lands on one side only, cannot compel the company to allow him to cross the railway for the purpose of reaching another person's lands on the other side: **Grand Trunk R.W. Co. v. Therrien**, 30 S.C.R. 485, and where the owner of lands on both sides of a railway being in enjoyment of a crossing, sells the land on one side to another without reserving a right of way over the crossing, neither the vendor nor purchaser may use the crossing and the com-

pany is entitled to close it up: **Midland R.W. Co. v. Gribble** (1895), 2 Ch. 129, 827.

But in **New v. Toronto, Hamilton & Buffalo Ry. Co.**, 8 Can. Ry. Cas. 50, the Board granted a crossing at the expense of the owner where the railway took no part of the owner's lands, but destroyed his access to the nearest highway. In **Toronto, Hamilton & Buffalo R.W. Co. v. Simpson Brick Co.**, 17 O.L.R. 632, 8 Can. Ry. Cas. 464, Anglin, J., upheld the power of a railway company under the Act of 1888 to agree with an owner to provide access to the nearest highway though his lands are not intersected by the railway.

Section 273 makes it clear that a crossing may now be ordered whenever the Board deems it necessary for the proper enjoyment of the land, and safe in the public interest. But terms may be imposed on the land owner: **New v. T.H. & B. Ry. Co.**, 8 C.R.C. 50; **Richards and Bennett v. G.T.R.**, 14 C.R.C. 329. And see notes to section 222.

A federal railway company will not be bound by provincial legislation requiring it to open crossings on the application of any owner present or future: **Grand Trunk R.W. Co. v. Therrien, supra**. Where, however, a railway company was released by the owner from its obligation to maintain a crossing, it was held that a tenant in occupation at the date of the release, was entitled to insist upon its maintenance for his purposes during the currency of his lease: **Corry v. Great Western R.W. Co.**, 7 Q.B.D. 322. The right to have a farm crossing being an easement, does not pass by parol but must be evidenced by deed, if a claim to it is to be enforced: **Mills v. Hopkins**, 6 U.C.C.P. 138. Special damages for breach of covenant to construct a crossing must be specially pleaded, and the covenantor's attention must be drawn to such special damages when the contract is made, if the covenantee is to recover them: **Shaver v. Great Western R.W. Co.**, 6 U.C.C.P., 321.

Persons who may use Crossings. A person may be entitled to a farm crossing if he is *bona fide* entitled to the land severed, even though he may have no legal claim to it: **Bolduc v. Canadian Pacific R.W. Co.**, Q.R. 23, S.C. 238, 3 Can. Ry. Cas. 197, which is similar in principle to **Davis v. Canadian Pacific R.W. Co.**, 12 A.R. 724. A person using a crossing at the invitation of the owner, has a right to do so, is not a trespasser, and may recover damages for negligence on the company's part while he is so

using it: **Plester v. Grand Trunk R.W. Co.**, 32 O.R. 55, 1 Can. Ry. Cas. 27.

Mode of User. Under the Act of 1888, section 191, it was doubtful whether the crossing could be used for other than "farm purposes," and though the question was raised in **Plester v. Grand Trunk R.W. Co.**, *supra*, it was not decided. Though the present section 272 expressly limits the user to "farm purposes," yet section 273 has been construed as enlarging the powers of the Board to grant a crossing in the nature of a farm crossing for the purpose of providing access from manufacturing premises to the nearest highway. See **New. v. Toronto, Hamilton & Buffalo Ry. Co.**, and **Toronto, Hamilton & Buffalo Ry. Co. v. Simpson Brick Co.**, *supra*.

In the **Plester Case** it was decided that it was within the term "farm purposes" to haul gravel taken from a part of the farm to a highway where it was to be deposited. This case seems to be hardly in accord with **Great Northern R.W. Co. v. McAllister** (1897), 1 I.R. 587, not cited in the judgment, where it was held that the owner of a farm crossing used for farm purposes only had no right to draw stones taken from a newly opened quarry, across it by means of a traction engine and waggons. In **Great Western R.W. Co. v. Talbot** (1902), 2 Ch. 759, it was decided that the owner of a crossing under an agreement had no right to increase the burden of traffic upon it by drawing not only his own goods over it, but the goods of other persons brought upon his land. These decisions were cited in the **Simpson Case**, but were there distinguished.

Construction and Maintenance. A provincial Act requiring the construction of farm crossings cannot bind a Dominion railway: **Grand Trunk R.W. Co. v. Therrien**, 30 S.C.R. 485, following **Canadian Pacific R.W. Co. v. Notre Dame de Bonsecours** (1899), A.C. 367. No provision existed in former Acts for deciding upon the place and mode of crossing, and the land-owner could not compel the railway to build a particular kind of crossing nor to put it at a particular spot, nor could the railway company force upon the owner any particular kind of crossing at any particular spot. It was simply the duty of the railway company to construct a reasonably fit and proper crossing, leaving it afterwards to be decided by the Court or a jury whether this duty had been fulfilled: **Reist v. Grand Trunk R.W. Co.**, 6 U.C.C.P. 421; **Burke v. Grand Trunk R.W. Co.**, *ibid.* 484. This crossing should be constructed by the railway company upon its

own land without delay and without waiting for permission from the landowner to enter on his land for the purpose of completing it: **Reist v. Grand Trunk R.W. Co.**, (on appeal), 15 U.C.R. 355. Whether a company would have any right to enter on an owner's land to construct approaches there, was not decided in that case, but it has been held in **Palmer v. Michigan Central R.W. Co.**, 2 O.W.R. 477, 2 Can. Ry. Cas. 239, 7 O.L.R. 87, 3 C.R.C. 194, that the company is not justified in entering on private lands to repair the approaches there, and that consequently there is no duty laid on it to make repairs off its own lands. There appears to be a distinction between the duty to repair approaches to highway crossings and bridges and approaches to farm crossings: see 3 Can. Ry. Cas. 201 and 202, and notes to section 241, *ante*.

Duties of Landowners and Railways at Crossings. In addition to repairing that part of the crossing on its own premises, the railway company must exercise due care in approaching a level farm crossing so that it may avoid injuring the owner or his property, so far as the exercise of reasonable care will permit; but apart from statute, the owner must also exercise reasonable care not to obstruct the movement of trains or to incur damage to his person or property. These reciprocal duties are fully discussed in **Bender v. Canada Southern R.W. Co.**, 37 U.C.R. 25. The statute now lays down certain duties which the landowner must perform, but this is probably little more than a statement of the law as declared in such cases as **Bender v. Canada Southern R.W. Co.**, and **Hurd v. Grand Trunk R.W. Co.**, 15 A.R. 58. Cattle passing over a farm crossing must now be "in charge" of some competent person. This expression has been considered in cases decided under section 271 of the Act of 1888, and was discussed in 1 Can. Ry. Cas. 442 and 443. Its interpretation must depend upon the circumstances of each case and is no doubt a question of fact for the jury: **Thompson v. Grand Trunk R.W. Co.**, 22 A.R. 453. The mere presence of attendants who are not numerous or experienced enough to exercise an effective control would not be sufficient: see **Thompson v. Grand Trunk R.W. Co.**, 18 U.C.R. 92, and **Cooley v. Grand Trunk R.W. Co.**, *ibid.* 96; but where there is sufficient control for ordinary purposes, there may be cases in which the fright caused by something improper in the management of the train will render the cattle unruly so that no ordinary agency can look after them: **Styles v. Michigan Central R.W. Co.**, 18 C.L.T. 5; **Duffield v. Grand Trunk R.W. Co.**, 31 C.L.J.

667; and *per* Gwynne, J., **Grand Trunk R.W. Co. v. James**, 1 Can. Ry. Cas., at p. 427.

See notes on sections 275, 278 and 386.

Enforcement of Right to Crossing. By section 273, *supra*, the Board of Railway Commissioners has exclusive power to prescribe when, where and how a farm crossing is to be constructed. **Grand Trunk R.W. Co. v. Perrault**, 5 Can. Ry. Cas. 293, 36 S.C.R. 671.

Where, however, the owner of lands has a statutory right to a crossing under section 272, the Courts may, under section 385, entertain a claim for damages for failure to provide such a crossing. See **Stiles v. Canadian Pacific R.W. Co.**, 8 Can. Ry. Cas. 190. As illustrating the principles which have formerly governed Courts in such matters, some cases already decided may be usefully mentioned. In **Martin v. Maine Central R.W. Co.**, Q.R. 19 S.C. 31, 1 Can. Ry. Cas. 31, it was held in Quebec that where the value of a piece of land cut off by a railway was so small that it did not justify the expense of a farm crossing, the Court in its discretion would allow compensation to the owner in lieu of a crossing. In **Reist v. Grand Trunk R.W. Co.**, 12 U.C.R. 675, it was held that the Court would not on an application of the owner for a mandamus designate a particular spot at which it should be placed, but the owner might sue for damages for failure to furnish a crossing pursuant to its statutory duty: **Burke v. Grand Trunk R.W. Co.**, 6 U.C.C. P. 484. See also **Reist v. Grand Trunk R.W. Co.**, *ibid.* 421, 15 U.C.R. 355.

The right to a crossing is not necessarily a matter of contract, and to justify the retention and use of a crossing already constructed, it is not necessary to prove a contract, if a legal right under sections 272 and 273, can be shewn: **Saindon v. Temiscouata Ry. Co.**, Q.R. 41, S.C. 337, 14 C.R.C. 326. Where a farm crossing of a certain width has been constructed under a contract between a railway company and the applicant's predecessor in title, and has been in use for 18 years, the company will not be required to enlarge it: **Stiles v. C.P.R.**, 8 C.R.C. 190. The Board is not bound by a contract for a certain kind of crossing between a railway company and a landowner, if the contract is in contravention of the Railway Act, or for any legal reason, void or voidable: **Ray v. C.N.R.**, 16 C.R.C. 276.

The Board has no power to declare that an existing

crossing is useless: **Saindon v. Temiscouata Ry. Co.**, Q.R. 41, S.C. 337, 14 C.R.C. 326.

As to the practice in apportioning the expenses of constructing and maintaining farm crossings ordered under this section, see **Riddell v. G.T.R.**, 13 C.R.C. 216.

Fences, Gates and Cattle-guards.

- 274.** (1) The company shall erect and maintain upon the railway,— Company shall erect.
- (a) fences of a minimum height of four feet six inches on each side of the railway; Fences.
 - (b) swing gates in such fences at farm crossings of the minimum height aforesaid, with proper hinges and fastenings: Provided that sliding or hurdle gates, already lawfully constructed, may be maintained until the first day of July, one thousand nine hundred and twenty, unless otherwise ordered by the Board; and, Gates.
 - (c) cattle-guards, on each side of the highway, at every highway crossing at rail level with the railway. Cattle-guards.
- (2) The railway fences at every such highway crossing shall be turned into the respective cattle-guards on each side of the highway. To be joined.
- (3) Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway lands. To be suitable.
- (4) The Board may, upon application made to it by the company, relieve the company, temporarily or otherwise, from erecting and maintaining such fences, gates and cattle-guards where the railway passes through any locality, in which, in the opinion of the Board, such works and structures are unnecessary. Exemption by Board.
- (5) Where the railway is being constructed through enclosed lands, the company shall, by fencing its right of way before any existing fences are taken down or by other effective means, prevent cattle or other animals escaping from or getting upon such enclosed lands or from one enclosure to another or upon the property of Duty of company while constructing.

the company by reason of such construction or of any act or thing done by the company, its contractors, agents or employees. R.S., c. 37, s. 254; 1910, c. 50, s. 5, 1911, c. 22, s. 9. Am.

Changes in the section:

Sub-section (b) of R.S.C., cap. 37, sec. 254, read, after the words "hurdle gates," "constructed before the first day of February, one thousand nine hundred and four may be maintained: and"

The word "lands" in sub-section 3 was added by 9 and 10 Edw. VII. Ch. 50, s. 5, the object of the amendment being to override such decisions as **G.T.R. v. James**, 31 S.C.R. 420, and **Hunt v. G.T.P.**, 9 C.R.C. 365, holding that the statute only obliged a railway company to fence so as to prevent animals from getting on the track.

The sub-section of R.S.C., cap. 37, sec. 254, corresponding to the present sub-section 4 exempted the company from fencing "through any locality in which the lands on either side are not inclosed and either settled or improved" unless so ordered by the Board. The present sub-section was introduced by 1-2 Geo. V., cap. 22, sec. 9. Sub-section 5 was first introduced by 1-2 Geo. V., cap. 22, sec. 9 but the words, "by fencing its right of way before any existing fences are taken down or by other effective means," "from one enclosure to another" and "of such construction" are new.

Under the old exemption, sub-section (4), the company was not obliged, in the case of unenclosed, unimproved land, to fence, unless ordered by the Board. Under the present sub-section it is bound to fence unless specifically exempted by the Board, and "whenever an application is made for fencing it should go as a matter of right unless the railway company can show valid reasons why they should be brought under the provisions of the present Act, sec. 274 (4)"—B.R.C. Circular 194, 19th Oct., 1921.

Sweeping changes made by the Act of 1903 and by the present Act make it unnecessary to consider in detail the law formerly in force under the Act of 1888, sec. 194, as amended by 53 Vic., cap. 28, sec. 2. The principle of interpretation is the same, but the Act of 1903 and still more the present Act, have so greatly extended the liability of railway companies for cattle killed or injured on their tracks that many defences which prevailed in cases

under previous statutes are no longer open to them. It will be enough to indicate the general principles which are still applicable upon which these cases were decided.

In England at common law there is not, and never was, any duty on the part of the landowner to fence against cattle belonging to others, and each owner was bound to keep his own cattle in: **Dovaston v. Payne**, 2 H.Bl. 527; **Pomfret v. Ricroft**, 1 Wm. Saunders 559. Following these decisions and the general rule enunciated in **King v. Pease**, 4 B. & Ad. 30, that railways when lawfully authorised to operate are not subject to any liability beyond the ordinary liability at common law, except where the Legislature has seen fit to impose it, the courts in England and in Canada have held almost uniformly that the railways' obligation and liability with regard to fencing are to be measured and limited by the precise wording of the Statute. A great many cases were cited in former editions of this book, which illustrate this principle, but are otherwise no longer authoritative, because of changes made by successive statutes in the nature and extent of the railways' obligation and liability.

Thus, in **G.T.R. v. James**, 1 C.R.C. 422, 31 S.C.R. 420, it was held that a railway company which had not erected fences on either side of a culvert under its tracks, was not liable for destruction of cattle which went through the culvert to a field, thence to the highway and thence to another part of the railway, where they were killed, inasmuch as it had not been guilty of any breach of duty under the statute then in force which merely required the erection of fences for the purpose of keeping cattle off the "railway." This case must now be read in the light of the amendment made by 9-10 Edw. VII., c. 4, adding the word "lands" in sub-sec. 3; but as the word "lands" has not been added also in sub-sec. 1 (a) it is submitted that the reasoning of the **James Case** is still effective to relieve the company of the obligation to fence, e.g., on either side of a railway bridge, though of course it would not now affect the company's liability under sec. 386, sub-sec. 1, *infra*.

Section 386, which in effect provides a code as to cattle killed or injured on the lands of a railway company, renders obsolete most of the earlier law on the subject. In such cases the negligence of the company in maintaining fences or in the management of its trains, gates or cattle-guards, and the negligence of the owner in allowing his animals to get at large are now equally irrelevant. See notes to that section.

It is submitted that the company is under no obligation to fence its station grounds; see remarks on **G.T.R. v. James, supra**; Elliott on Railways, page 1834; **McGrath v. Detroit**, 22 Am. and Eng. Ry. Cas. 574; **Cornell v. Manistee**, 11 Am. and Eng. Ry. Cas. N.S. 263; **Newell v. C.P.R.**, 5 C.R.C. 372, and cases there cited. As to fencing across streams, see **Abrey v. C.P.R.**, 23 C.R.C. 17.

The mere fact that a fence is made of barbed wire and that cattle have been injured by running against it, does not show that the fence is a nuisance or dangerous and the company is not necessarily liable for using that material: **Hillyard v. G.T.R.**, 8 O.R. 583; **Plath v. Grand Forks Ry.**, 3 C.R.C. 331; **McKellar v. C.P.R.**, 3 C.R.C. 322.

The power of the Board to grant exemption under sub-sec. 4 is subject to some limitation. Thus, under the former Act, a General Order issued by the Board requiring all railway companies to fence their lands in localities where the lands on either side were not enclosed, settled or improved, was held to be without jurisdiction, as the Act contemplated the exercise of discretion after enquiring into the circumstances in each locality: **Re C. N.R. Co.**, 10 C.R.C. 104, 42 S.C.R. 443.

A Dominion Railway Company is not bound to erect fences to comply with provincial legislation: **Madden v. Nelson, etc., Ry. Co.**, 5 B.C.R. 541; (1899) A.C. 626; **G.T.R. v. Therrien**, 30 S.C.R. 485.

This section does not prevent an agreement for a farm crossing with gates in lieu of cattle-guards at an unopened road allowance used as a farm crossing: **Brook v. C.P.R.**, 18 C.R.C. 78, 18 D.L.R. 184.

The obligation to fence being statutory, the Board declined to extend the time for complying with a specific order to fence: **Re Fencing at Savona**, 16 C.R.C. 195.

Order made for fencing under former Act, with penalty for default if order disobeyed: **Nutana v. C.N.R.**, 14 C.R.C. 11, 7 D.L.R. 888.

Gates to be Kept Closed.

275. The persons for whose use farm crossings are furnished shall keep the gates at each side of the railway closed, when not in use. R.S., c. 37, s. 255.

See section 386, *post*, and notes on that section; also notes on section 274, *supra*.

The question arises whether the duty imposed by this section is absolute. The provisions of section 386 undoubtedly imply that for some purposes it is not. Thus the Company must show not merely that a farm crossing gate has been left open but that it has been left open wilfully or negligently in order to defend successfully on that ground in an action for cattle killed or injured on the track. Similarly, in a prosecution under sec. 406, sub-sec. (a) proof must be given that the gate was left open "wilfully." **Quaere**, whether the liability to the company and to persons injured, which is expressly imposed by sec. 406, sub-secs. 2 and 3, but is limited by the word "wilfully" in sub-sec. (a) cuts down the general liability to them which would otherwise accrue under section 275 for breach of an absolute statutory duty. It may, perhaps, have that effect.

**Opening Railway for Traffic.
Inspection and Leave of Board.**

276. (1) No railway, nor any portion thereof, shall be opened for the carriage of traffic, other than for the purposes of the construction of the railway by the company, until leave therefor has been obtained from the Board, as hereinafter provided.

Leave of
Board for
opening
railway.

(2) When the company is desirous of so opening its railway or any portion thereof, it shall make an application to the Board for authority therefor, supported by affidavit of its president, secretary, engineer or one of its directors, to the satisfaction of the Board, stating that the railway, or portion thereof, desired to be so opened, is in his opinion sufficiently completed for the safe carriage of traffic, and ready for inspection.

Application
therefor.

(3) Before granting such application, the Board shall direct an inspecting engineer to examine the railway, or portion thereof, proposed to be opened.

Inspection.

(4) If the inspecting engineer reports to the Board, after making such examination, that in his opinion the opening of the railway or portion thereof so proposed to be opened for the carriage of traffic, will be reasonably free from danger to the public using the same, the Board may make an order granting such application, in whole or in part, and may name the time therein for the opening of the railway or such portion thereof, and thereupon

When
opening
reported
to be safe.

Board may
grant
application.

the railway, or such portion thereof as is authorised by the Board, may be opened for traffic in accordance with such order.

When
opening
reported
dangerous.

(5) If such inspecting engineer, after the inspection of the railway, or any portion thereof, reports to the Board that, in his opinion, the opening of the same would be attended with danger to the public using the same by reason of the incompleteness of the works or permanent way, or the insufficiency of the construction or equipment of such railway, or portion thereof, he shall state in his report the grounds for such opinion, and the company shall be entitled to notice thereof, and shall be served with a copy of such report and grounds, and the Board may refuse such application in whole or in part, or may direct a further or other inspection and report to be made.

Notice.

Board may
refuse.

Further
inspection.

(6) If thereafter, upon such further or other inspection, or upon a new application under this section, the inspecting engineer reports that such railway, or portion thereof, may be opened without danger to the public, the Board may make an order granting such application in whole or in part, and may name the time therein for the opening of the railway, or such portion thereof and thereupon the railway or such portion thereof as is authorised by the Board, may be opened for traffic in accordance with such order.

Order for
opening.

Leave to
carry freight
traffic.

(7) The Board, upon being satisfied that public convenience will be served thereby, may, after obtaining a report of an inspecting engineer, allow the company to carry traffic over any portion of the railway not opened for the carriage of traffic in accordance with the preceding provisions of this section. R.S., c. 37, s. 261; 1910, c. 50, s. 6.

Former section 261, sub-section 7, amended in 1910 by omitting "freight" before "traffic" in the fourth line. Section 405 provides a penalty against any breach of this section.

See English Regulation of Railways Acts, 5 & 6 Vict., cap. 55, secs. 45 and 46, and 36 & 37 Vict., cap. 76, sec. 6, the latter section being in most respects similar to sub-section 4, *supra*.

Until a railway is declared to be open for public traffic, the company is not subject to the liabilities of common carriers, nor bound as such to carry whatever traffic is offered, unless it has invited the public to use it or has held itself out as ready to receive ordinary traffic: **Macrae v. C.P.R.**, Mont. L.R. 4 Q.B. 140. **Browne v. Brockville & Ottawa Ry. Co.**, 20 U.C.R. 202, is a case in which the liability of a railway company for the negligence of a contractor while the road was under construction, was somewhat discussed and the opinion was expressed, though no definite decision was given, that under such circumstances the company would not be liable for injuries due to the contractor's negligence.

Where the down line of a railway had been approved in England under 36 and 37 Vict., cap. 76, sec. 6 (similar to sub-section 4, *supra*), and the up line, though not approved, had also been open for traffic, an injunction restraining the use of the up line by the company was granted at the instance of the Attorney-General and it was held that the Board in England was not **functus officio** because it had approved of the opening of the down line. It was also held that the Court would not review the decision of the Board nor the grounds on which the Inspector had based his report. The Board having declared its decision, that, without more, was sufficient to enable the Court to act at the instance of the Attorney-General. **Attorney-General v. Oxford, etc., Ry. Co.**, 2 W.R. 330, followed and approved: **Attorney-General v. Cockermouth**, L.R. 18 Eq. at p. 178. The mere fact that an illegal act is being committed, such as the attempt to operate a new railway or portion thereof before the sanction of the Board is obtained, is sufficient in all such cases to justify an injunction at the instance of the Attorney-General without proof of the existence of any actual damage: **Attorney-General v. Shrewsbury Bridge Co.**, 21 Ch.D. 752; **Attorney-General v. London & Northwestern Ry. Co.** (1900), 1 Q.B. 78.

The prohibition contained in this section is equally applicable to the whole railway or to a portion thereof. After operating a line for some years after it had been approved, a railway laid a new line parallel to their main line for about a mile and substituted a new for an old junction at a point nearly opposite to the old one and also made two new stations on the new line; it was held that the new portion should not have been used without previous notice to the Board of Trade: **Attorney-General v. Great Western Ry. Co.**, L.R. 7 Ch. 767.

Where an inspector under the corresponding English section reports that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works and gives the grounds of his decision, the provisions of the statute are satisfied, the Board of Trade has exclusive jurisdiction in the matter, and the Court will not enter into the question whether the reasons given by the Inspector do not show on their face that he has come to a wrong conclusion. **Attorney-General v. Great Western R.W. Co.**, 4 Ch. D. 735. The railway can only be opened for traffic upon application by the company: **Central Saskatchewan Board of Trade v. G.T.P. Ry. Co.**, 10 Can. Ry. Cas. 135.

The mere fact that the work has been approved by an officer or the Board appointed to supervise or inspect it would not relieve the company from negligence for any subsequent defect whereby an accident happens; see notes to section 373 (e), *infra*. Section 391 (4), *infra*, also expressly provides that no inspection shall relieve the company from any liability otherwise imposed by law.

The Board has no jurisdiction to allow a company to charge tolls for general business during construction. **Riverside etc. Co. v. C.P.R.**, 18 C.R.C. 17.

The Board has no jurisdiction as to traffic till application is made to open the railway. **Re Edmonton etc. Ry. Co.**, 19 C.R.C. 395.

Board may order Railway to be Opened.

Board may
order
opening.

277. The Board, in any case where it deems it right, may, upon the application of any person interested or of its own motion, order the opening of any railway or line or any portion thereof, for traffic, and may require the company to do all things necessary therefor, within such time as the Board fixes. **New.**

Under the last section 276 (former 261), the Board had no jurisdiction to compel a railway company to open its railway for traffic, but if it applied for permission to do so it must carry freight and passengers under the provisions of the Act. **British Columbia and Alberta Municipalities v. G.T.P. Ry. Co.**, 13 C.R.C. 463. **Central Saskatchewan Boards of Trade v. G.T.P.**, 10 C.R.C. 135. Under this section the Board now has power to order the railway or any portion thereof to be opened for traffic.

Safety and Care of Roadway.

Animals not to be at large near Highway Crossings.

278. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection.

Cattle not allowed at large near railway.

(2) All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the pound-keeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property. R.S., c. 37, s. 294 (1) (2). Am.

May be impounded.

Sub-section (1) of the former section, viz., 294, had at the end, after "intersection," the words "or straying upon the railway." These words have apparently been dropped for the purpose of making the section conform to section 386, which provides that if the animals "get upon the lands of the company, etc.," the owner can recover from the company for damage caused to or by such animal, in spite of its being at large in breach of section 278.

The duty of the railway company to provide cattle guards at highways is provided for by the same section, and in the same terms as the duty to maintain fences, the clause now being section 274. Prior to the passing of the Railway Accidents Act, 1857, 20 Vict., cap. 12, sec. 16, this section had the effect of rendering a railway company liable where cattle got on the track through defective cattle guards, even though they were straying on the highway at the time: **Huist v. Buffalo and Lake Huron Ry.**, 16 U.C.R. 299; and this rule was sometimes adopted in Quebec, even after the passing of the statute in question: **Pontiac Pacific Junction Ry. v. Brady**, Mont. L.R. 4 Q.B. 346; **Cross v. C.P.R.**, Que. R. 2 S.C. 365; but the law in Quebec appears to be now settled in conformity with the present law in Ontario as we are about to deal with it: **Cross v. C.P.R.**, Q.R. 3, Q.B. 170: **Campbell v. G.T.R.**,

Q.R. 3 Q.B. 570; Abbott on Railways, p. 406. The section of the Railway Accidents Act, already cited, made a very marked change in the law. It was passed in the interests of the travelling public to lessen the danger from derailment of trains, through stray cattle lying down on the track: **Thompson v. G.T.R. Co.**, 18 U.C.R. 92; **McGee v. Great Western Ry.**, 23 U.C.R. at p. 297; **Markham v. Great Western Ry.**, 25 U.C.R., at p. 576; and was adopted without change in all subsequent consolidations of the Railway Act, and appears in the Act of 1888 as section 271. Being in the public interest, it received a wide construction, and it was held that where cattle were at large upon the highway, the owner could not recover for their loss, whether they were killed on the highway at the point of intersection with the railway: **Ferris v. G.T.R.**, 16 U.C.R. 474; or on the railway lands to which they had wandered owing to the absence or defective condition of cattle guards: **Simpson v. G.T.R.**, 17 U.C.R. 57; **Thompson v. G.T.R.**, 18 U.C.R. 92; **Cooley v. G.T.R.**, *ibid.*, 96; **Markham v. Great Western Ry.**, 25 U.C.R. 572; **Thompson v. G.T.R.**, 22 A.R. 453; **Nixon v. G.T.R.**, 23 O.R. 124; **Whitman v. Windsor, etc., Ry.**, 18 N.S.R. 271; **Phillips v. C.P.R.**, 1 Man. L.R. 110; and the mere fact that the railway company omitted to give the usual highway signals or was negligent in the management of its trains, would not give the owner the right to recover unless such negligence amounted to recklessness and wilful misconduct on the part of its servants. See the cases last cited, and particularly **McGee v. Great Western Ry.**, *supra*.

Under section 386, *infra*, this is radically changed. The only case in which proof by the company of a breach of this section affords a defence is where the animals are killed or injured at the intersection of a highway with a railway at rail level. In no other case can the company, whether negligent or not, escape liability on this ground.

The question whether animals using the highway within half a mile of the railway track are sufficiently "in charge" within the meaning of the Railway Act must depend upon the circumstances of each case; but it is apparent from the cases already cited, particularly the two **Thompson Cases**, *supra*, that the control which the owner is required to exercise over them must be sufficient, under ordinary circumstances at least, to enable him to keep them off the railway track if necessity requires; and the mere presence of attendants, who are not numerous or experienced enough to do so, though they make the attempt, does not satisfy the terms of the statute; but where

there is sufficient control for ordinary purposes, there may be cases in which the fright caused by something unusual or improper in the management of the train will render them so unruly that no ordinary power can control them: see **Styles v. Michigan Central Ry.**, 18 Canadian Law Times 5; **Duffield v. G.T.R.**, 31 Canada L.J. 667, and the **dictum** of Gwynne, J., in **G.T.R. v. James**, 1 C.R.C. at p. 427; but "where the evidence for the plaintiff clearly and decisively shows that a horse, for the killing of which by their locomotive an action is brought against a railway company, was not in charge, the judge presiding at the trial ought, as a matter of law, to rule that the company have incurred no liability whatever:" **per Draper, C. J.**; **Markham v. Great Western Ry.**, 25 U.C.R. 572, at p. 576, quoted by Osler, J.A., in **Thompson v. G.T.R.**, 22 A.R. at p. 459. Where an animal is properly "in charge" within the meaning of the Act, and the company omits to give the usual signals for highway crossings, the owner would be entitled to recover: **Tyson v. G. T. Ry.**, 20 U.C.R. 256, and see **Sexton v. G.T.R.**, 9 C.R.C. 119.

Sections 194 and 271 of the Act of 1888, the latter section corresponding to this section, were much discussed in **James v. G.T.R.**, 1 C.R.C. 407 and 409, and **G.T.R. v. James**, *ibid.*, 422; where the principles laid down in the earlier cases here mentioned were considered and re-affirmed, and it was held that a railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse and where cattle went through the culvert into a field and from thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. Where, however, the failure of a railway company to maintain its fences was the cause of cattle getting out and straying on the highway and thence on to the track, where they were killed, the company was held liable, and this section afforded no defence, as the breach of it was the fault of defendants and not of the plaintiff: **Davidson v. G.T.R.**, 2 C.R.C. 371; see **Fensom v. C.P.R.**, *ibid.*, 376, 3 C.R.C. 231, 4 C.R.C. 76.

Thistles and Weeds to be Kept Cut.

279. Every company shall cause thistles and all noxious weeds growing on the right of way, and upon land of the company adjoining the railway, to be cut down or to be rooted out and destroyed each year, before such

Company
to remove
weeds, etc.

thistles or weeds have sufficiently matured to seed. R.S., c. 37, s. 296.

The evident intention of this section is to prevent damage to adjoining lands by allowing the seeds of noxious weeds to grow and spread; but at common law the company is bound to keep its line clear of dried or inflammable weeds or rubbish likely to catch fire and spread from its own lands to other property, and failure to do so may constitute negligence for which the company will be liable: **Rainville v. G.T.R.**, 1 C.R.C. 113, 117; **G.T.R. v. Rainville**, *ibid.* 125, and companies are now required by statute (section 280), to keep their right of way free from combustible material. It is not *per se* negligence for a railway company to allow grass and weeds to grow on a side track, so as to present the possibility of an employee catching in it and being hurt by a train: **Wood v. C.P.R.**, 6 B.C.R. 561, 30 S.C.R. 110.

Dry Grass to be Removed.

Company to
keep right of
way clear.

280. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter. R.S.C., cap. 37, sec. 297.

This duty, it has been held, applies only to a railway under operation, not to one still under construction. **Margach v. Mackenzie Mann & Co.**, 20 C.R.C. 427, 28 D.L.R. 1, 9 Alta. L.R. 548. In **Westhaver v. Halifax & S.W. Ry. Co.**, 14 D.L.R. 633, 16 C.R.C. 29, it was held that persistent breach of this section is ground for awarding liberal damages in case of fire. In **Halifax & S.W. Ry. Co. v. Schwartz**, 11 D.L.R. 790, 15 C.R.C. 186, 47 S.C.R. 590, it was held that the duty is absolute and in case of breach and injury to an adjoining owner, the railway company is liable. See also **Dutton v. C.N.R.**, 23 D.L.R. 43, 19 C.R.C. 72.

A breach of this section, if such breach contributed to the resulting fire, will obviously have the effect of taking an action outside the limitation of five thousand dollars under section 387.

Fire Protection.

Orders and
regulations.

281. (1) The Board may make orders and regulations,—

(a) respecting the construction, use and maintenance,

in connection with the railway, of fire guards or other works which may be deemed by the Board to be necessary and suitable to prevent, as far as possible, fires from being started or occurring, upon, along or near the right of way of the company;

Fire guards,
etc.

- (b) requiring the company to establish and maintain an efficient and competent staff of fire-rangers, equipped with such appliances for fighting fires or preventing them from spreading, as the Board may deem proper, and to provide such fire-rangers with proper and suitable equipment to enable them to move from place to place along the line of railway with all due speed;

Fire-range.

- (c) requiring the company to maintain an efficient patrol of the line of railway and of the lands in the vicinity thereof to which fires may spread, and generally defining the duties of the company and of the fire-rangers in respect thereof;

Patrol.

- (d) requiring the company to make returns of the names of fire-rangers in its employ in the performance of the above-mentioned duties, and of the places or areas in which they are from time to time engaged;

Returns as
to fire-
rangers.

- (e) requiring the company to make reports and returns of fires occurring upon or near its right of way.

Reports of
fires.

(2) Any such orders or regulations may be made applicable during or after the construction of the railway, or during such time, and in such manner, as the Board deems proper.

Applicability
of orders,
etc.

(3) For the purpose of fighting and extinguishing fires, the fire-rangers of the company may follow the fires which spread from the railway, to, over and upon the lands to which they may spread.

Following
fires.

(4) Subject to the terms and conditions of any order or regulation of the Board, the company may at all times

Entering
lands for
fire-guard
purposes.

enter into and upon any lands of His Majesty or of any person lying along the railway, for the purpose of establishing and maintaining thereon the fire guards or other protection directed by the Board, and for the purpose of freeing from dead or dry grass, weeds, and other unnecessary inflammable matter, the land between such fire guards and the line of railway. R.S., c. 37, s. 30 (f), **part**; 1911, c. 22, ss. 2, (4). Am.

Sub-section (1) (a) is taken from the latter part of R.S., ch. 37, sec. 30 (f). Sub-sections (1), (b), (c) and (d) and sub-section 3 are taken from 1911, chap. 22, sec. 2, while sub-section 4 comes from 1911, cap. 22, sec. 10 (4).

The observance of these provisions does not appear to assist the railway company in disputing liability under section 387, where the amount is less than \$5,000.00.

Packing.

Packing
in spaces.

282. (1) The spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than four inches in width, shall be filled with packing up to the under side of the head of the rail.

In splayed
ends.

(2) The spaces between any wing rail and any railway frog, and between any guard rail and the track rail alongside of it, shall be filled with packing at their splayed ends, so that the whole splay shall be so filled where the width of the space between the rails is less than four inches.

Height of.

(3) Such packing shall not reach higher than to the under side of the head of the rail.

Of what
to consist.

(4) Such packing shall consist of wood or metal, or some equally substantial and solid material, of not less than two inches in thickness, and, where by this section any space is required to be filled in on any railway, shall extend to within one and a half inches of the crown of the rails in use, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid: Provided that if there is at any time any method of packing which,

in the opinion of the Board, is an improvement over the present requirements, the Board, after hearing on notice, may authorise or direct the use of such improved method. R.S., c. 37, s. 288. Am.

The last four lines beginning "provided that" are new, and replace sub-section 5 in former section 288 *q.v.* This section corresponds to section 262 in the Act of 1888 and section 230 in the Act of 1903. It was amended in consequence of the decision of the Judicial Committee in *G.T.R. v. Washington* (1899), A.C. 275.

Board may Direct Inspection and Order Repairs.

283. Whenever any complaint is made to the Board, or the Board receives information, that any railway, or any portion thereof, is dangerous to the public using the same, from want of renewal or repair, or insufficient or erroneous construction, or from any other cause, or whenever circumstances arise which, in its opinion, render it expedient, the Board may direct an inspecting engineer to examine the railway, or any portion thereof.

When
railway out
of repair.

Inspection.

(2) The Board may, upon the report of the inspecting engineer, order any repairs, renewal, reconstruction, alteration or new work, materials or equipment to be made, done, or furnished by the company upon, in addition to, or substitution for, any portion of the railway, which may, from such report, appear to the Board necessary or proper, and may order that until such repairs, renewals, reconstruction, alteration, and work, materials or equipment are made, done and furnished to its satisfaction, no portion of the railway in respect of which such order is made, shall be used, or used otherwise than subject to such restrictions, conditions and terms as the Board may in such order impose.

Board may
order re-
pairs.

May enjoin
operation
meantime.

(3) The Board may by such order condemn and thereby forbid further use of any rolling stock which, from such report, it may consider unfit to repair or use. R.S., c. 37, s. 262.

Rolling
stock may
be con-
demned.

The Board has repeatedly ruled that such reports are not subject to public inspection and has declined to allow them to be produced at coroners' inquests.

For penalty see section 411, *post*.

Inspecting Engineer may Forbid Operation.

Inspecting
engineer
may forbid
operation.

By notice.

284. (1) If in the opinion of any inspecting engineer, it is dangerous for trains to pass over any railway, or any portion thereof, until alterations, substitutions or repairs are made thereon, or that any of the rolling stock should be run or used, the said engineer may, by notice, in writing,—

- (a) forthwith forbid the running of any train over such railway or portion of railway; or
- (b) require that the same be run only at such times, under such conditions, and with such precautions, as he by such notice specifies; and,
- (c) forbid the running or using of any such rolling stock.

What notice
shall state.

(2) Such notice shall state the reasons for such opinion of the inspecting engineer, and distinctly point out the defects or the nature of the danger to be apprehended.

Service of
notice.

(3) The notice may be served upon the company owning, running, or using such railway or rolling stock, or upon any officer having the management or control of the running of trains upon the railway, or the management or control of the rolling stock.

Action of
Board.

(4) The inspecting engineer shall forthwith report such notice to the Board, which may either confirm, modify or disallow the act or order of such engineer.

Notice
thereof.

(5) Notice of such confirmation, modification or disallowance, shall be duly given to the company. R.S., c. 37, s. 263.

For penalty see section 411, *post*.

Accidents.**Notice to be Sent to Board.**

Notice to
Board of
accidents.

285. (1) Every company shall, as soon as possible and immediately after the head officers of the company have received information of the occurrence upon the railway belonging to such company, of any accident attended with personal injury to any person using the railway, or to any employee of the company, or whereby any bridge, culvert, viaduct, or tunnel on or of the railway has been broken or so damaged as to be impassable or unfit

By company.

for immediate use, give notice thereof, with full particulars, to the Board. The conductor or other employee in charge of the train, place or structure in connection with which such accident occurred, shall as soon as possible after such accident notify the Board of the same by telegraph.

By em-
ployees.

(2) The Board may by regulation declare the manner and form in which such information and notice shall be given and the class of accidents to which this section shall apply, and may declare any such information so given to be privileged. R.S., c. 37, s. 292; 1917, c. 37, s. 8.

Board may
regulate.

Section 235 of the Act of 1903 only required notice to be given to the Board in cases of "accident attended with serious personal injury." By the amendment of 6 Edw. VII., cap 42, sec. 22, the section was extended to cover all cases of personal injury by omitting the word "serious" and the words "or to any employee of the company" were added.

The 1917 amendment was in these words: "Any conductor or other employee making a report to the company of the occurrence of any such accident shall as soon as possible after such accident notify the Board of the same by telegraph." Difficulty arose under this amendment as to whether it was sufficient for the chief despatcher to report to the Board after receiving the report of the conductor or other employee on the spot. The present amendment was designed to remove this uncertainty.

For the penalty for failure to comply with the provisions of this section see sec. 412, *infra*.

Similar legislation in England exists in 34 & 35 Vict., cap. 78, sec. 6, and the order of the Board of Trade regulating the practice in making such returns, will be found in Browne & Theobald, 3rd ed., pp. 658, *et seq.*

By section 381, *post*, annual returns are to be made to the Board of all accidents and casualties to persons, animals or property, and by section 383, these, with other returns there mentioned, are to be privileged. The returns required by this section are privileged only when so declared by the Board. No general regulations on the subject have been made. For notes on privilege see section 383.

Board May Direct Inquiry.

Appointment
of officer to
inquire into
accidents.

286. The Board may appoint such person or persons as it thinks fit to inquire into all matters and things which it deems likely to cause or prevent accidents, and the causes of and the circumstances connected with any accident or casualty to life or property occurring on any railway, and into all particulars relating thereto.

Officer to
report to
Board.

(2) The person or persons so appointed shall report fully, in writing, to the Board, his or their doings and opinions on the matters respecting which he or they are appointed to inquire, and the Board may act upon such report and may order the company to suspend or dismiss any employee of the company whom it may deem to have been negligent or wilful in respect of any such accident. R.S., c. 37, s. 293.

Powers of
Board.

Such reports will not be disclosed in the public interest. 4th Ann. Rept. 237.

For notes analogous English legislation see notes to previous section.

Operation and Equipment.

General Note on Negligence in Operating Railways.

The subject of negligence in failing to comply with the provisions of the statute respecting the operation of railways will be dealt with under their particular heads; but the following general remarks are made by way of introduction.

Liability to Public for Servant's Negligence. In considering whether a master is liable for the acts of his servant resulting in injury to a third person or persons, the question in each case is whether the servant acted within "the scope of his employment," and if the answer is in the affirmative, the master is liable for the consequences even though what the servant did was wrongful and may have been contrary to the express instructions of the master: *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Poulton v. London, etc., Ry. Co.*, L.R. 2 Q.B. 534; *Allen v. London, etc., Ry. Co.*, L.R. 6 Q.B. 65; *Emerson v. Niagara Navigation Co.*, 2 O.R. 528; *Coll v. Toronto Ry. Co.*, 25 A.R. 55; *Stedman v. Baker* 12 Times, L.R. 451; *Hanson v. Waller* (1901), 1 K.B. 390; *Dawdy v. Hamilton, etc., R.W. Co.*, 2 C.R.C. 196; *G.T.R. v. Pickering*, 18 C.R.C. 225, 50 S.C.R. 393; and this rule is applied so as to render a railway company liable for a circular issued by its general manager which was found to

be libellous, as it was considered that the manager had sufficient authority, acting in the course of his duty, to render his employers liable for a libel upon one of their conductors: **Tench v. Great Western R.W. Co.**, 32 U.C.R. 452, 33 U.C.R. 8. See also **Diplock v. C.N.R.**, 30 D.L.R. 240, 20 C.R.C. 365, 53 S.C.R. 376. If, however, the company itself had no right to do the act complained of, then it would be impossible to delegate to an employee power which the company does not possess, and could not lawfully exercise, and there is no liability for acts of such a nature done by a servant arising from any theory of the delegation of an implied authority, and so, where a railway company had power to arrest for non-payment of a passenger's fare, but had no power to arrest for non-payment of freight shipped by a customer, it was held that it could not be made liable to a person arrested by its stationmaster for failure to pay freight on goods shipped: **Poulton v. London, etc., Ry. Co.**, L.R. 2 Q.B. 534, and where a railway constable made an arrest upon suspicion of theft, some time after the offence was supposed to have been committed, it was held that no authority could be implied, the railway company having no authority to do what the constable had done: **Thomas v. C.P.R.**, and **Bush v. C.P.R.**, 6 C.R.C. 372.

The onus of proving that a servant was acting within the scope of his duty or authority is on the plaintiff, and therefore where an omnibus driver was absent and the conductor drove it and no evidence was given that he had any right to do so, a person injured by the conductor's negligence or negligent driving was unable to recover damages from the owner: **Beard v. London General Omnibus Co.** (1900), 2 Q.B. 530.

Where a baggageman assaulted a passenger, it was held that the defendants were not liable because he did not act as their servant "or in pursuance of his powers": **Cunningham v. G.T.R.**, 31 U.C.R. 350, but a company has been held liable where section men in promoting the objects for which they are employed did so in a careless or negligent way, thereby injuring a third person: **Vars v. G.T.R.**, 23 U.C.C.P. 143; and where a wrecking crew employed in lifting an engine which had been derailed allowed steam to escape, thereby frightening plaintiff's horse and injuring her, the defendants were held liable: **Stott v. G.T.R.**, 24 U.C.C.P. 347. This case was somewhat near the line, as the circumstances suggested mere horse play on the part of the wrecking crew, and not a mistaken attempt to further the master's interests. A somewhat similar action decided in a similar

way is **Hammond v. G.T.R.**, 4 C.R.C. 232, 9 O.L.R. 64. That was a case in which the gateman employed to lower gates threw a cinder at a boy who was leaning on them preventing their being raised. The plaintiff's eye was put out and he brought an action against the gateman and the company. It was contended that the plaintiff could not recover as the gateman acted out of malice and ill-temper, and not in the company's interests. The following quotation from the charge of the Trial Judge (Anglin J.) clearly explains the distinction. "Now, what was the object with which Jarman threw that cinder? If he threw it in a moment of irritation—annoyed at the boys being on the gates—and not for the purpose of getting them away so that he could open the gate, but simply to gratify some spiteful feeling of his own against the boys, then it was not an act done in the course of his employment, and the railway company would not be responsible for it. If, on the other hand, his object was not to hit the boy, but to attract his attention and get him away from the gates so that they could be opened, you would probably come to the conclusion that he did it in the course of his employment—the opening of the gates—and if you reach that conclusion then that makes the employers liable for the act which the servant did." This charge was approved by the Divisional Court. On this subject see also **Sanderson v. Collins**, (1904), 1 K.B. 628; **Forsythe v. C.P.R.**, 4 C.R.C. 402, 10 O.L.R. 73; **Roth v. C.P.R.**, 4 C.R.C. 238.

For cases of alleged constructive "invitation to alight" or to enter, see **G.T.R. v. Mayne**, 39 D.L.R. 691, 22 C.R.C. 218, 56 S.C.R. 95; **Gazey v. Toronto Ry. Co.**, 38 D.L.R. 637, 22 C.R.C. 233; **Hill v. Toronto Ry. Co.**, 22 C.R.C. 240, 40 O.L.R. 393; **C.P.R. v. Hay**, 46 D.L.R. 87, 24 C.R.C. 359, 58 S.C.R. 283. Negligence in the method of inspection may be found by the jury in the case of the breaking of a piece of machinery in an unexplained way: **Pyne v C.P.R.**, 23 C.R.C. 281, 43 D.L.R. 625; **Ashbee v. C. N.R.**, 14 D.L.R. 701, 18 C.R.C. 87; 6 Sask. L.R. 135. An employer must employ competent workmen, but a mere finding that e.g., a motorman is incompetent will not render a company liable unless the jury puts its finger on some act or omission which was the direct cause of the injury: **Mehner v. Winnipeg Electric Ry. Co.**, 21 D.L.R. 786, 18 C.R.C. 179.

Liability to the Public for Wrongful Acts of Others.

Under certain circumstances a railway company has been held liable to passengers for injuries done by a fellow

passenger where the conductor knew of the danger of an attack upon the plaintiff and failed to prevent it: **Blain v. C.P.R.**, 2 C.R.C. 69 and 85; **C.P.R. v. Blain**, 3 C.R.C. 143, 4 C.R.C. 429, (1904), A.C. 543, 34 S.C.R. 74, 36 S.C.R. 159. But where the injury has been caused by the action of a trespasser on a railway company's premises loosening a brake and allowing a car to run down an inclined siding to the highway, whereby the plaintiff was injured the defendants were excused: **McDowall v. Great Western Ry.** (1903), 2 K.B. 331. Again, a company is not liable where an intending passenger is injured by the unauthorised act of a passenger in throwing off his luggage from a train that is not stopping: **Galbraith v. C.P.R.**, 17 D.L.R. 65, 17 C.R.C. 43; but see **Green v. B.C. Electric Ry.**, 25 D.L.R. 543, 19 C.R.C. 240. Where defendants knowingly allowed a great crowd of intending passengers to congregate on the station platform and did not have a sufficient staff to cope with the crowd that might have been expected, they were held liable for injuries to persons pushed from the platform in the crush: **Fraser v. Caledonian Ry.**, 5 F. (Ct. of Sess.) 42. See also **Galbraith v. C.P.R.**, 17 D.L.R. 65, 17 C.R.C. 43. Under certain circumstances the company may also be liable for the negligence of a contractor or sub-contractor. **Ballantine v. The Ontario Pipe Line Co.**, 16 O.L.R. 654; **Hounscome v. Vancouver Power Co.**, 15 C.R.C. 69, 9 D.L.R. 823.

The general rule, however, is that a person is not responsible for the negligence of an independent contractor where the work to be done could not, in the ordinary course, lead to injurious consequences, but being delegated to an independent contractor is so negligently carried out by him as to cause injury to another: **Bower v. Peate**, 1 Q.B.D. 321; **Pearson v. Cox**, 2 C.P.D. 369. In **Williams v. Cunningham**, Q.R. 23, S.C. 263, a firm employed the defendants to move their effects from certain premises. While doing so a table was lowered from one of the upper windows and the plaintiff (who was not an employee of the defendants but of the firm whose furniture was being moved) while assisting the defendant's servants was injured by the table falling on him owing to their careless handling. It was held that as the defendants alone had charge of the moving and of the operations of their servants they were alone liable for the accident. Compare with this **Hurdman v. Canada Atlantic Ry.**, 25 O.R. 209, 22 A.R. 292; and **Canada Atlantic Ry. v. Hurdman**, 25 S.C.R. 205.

Liability of Railway Companies to Their Employees.

At common law an employer is bound as part of his contract to take reasonable care in the carrying on of his business so as not to subject those employed by him to undue risk; and he must employ competent servants so as to protect other employees against injury from their incompetency; and maintain his premises in reasonably safe condition and use machinery which is reasonably fit and safe for its purpose. Speaking generally a master was not at common law, liable for injury to his servant, if the master had not himself been negligent or guilty of a breach of his duty as outlined above. He was not liable for such injury if it arose from the negligence of a fellow servant; nor if the servant injured was found to have voluntarily taken the risk; or to have himself caused or contributed to the accident.

Employers Liability Acts and Workmen's Compensation Acts in England and the several Provinces of Canada, have completely changed the relations of master and servant in most industrial occupations as to the proportions in which they shall share the risk and burden of financial loss resulting from accidents arising out of or in the course of employment. The principle has been asserted that such loss forms part of the necessary cost of carrying on the industry, and that the industry should bear at least the larger share of it. In most of the Provinces compensation is paid to injured workmen, or the dependents of workmen killed out of a fund provided by means of assessments on the employing industries and controlled by a Government Board. Serious and wilful misconduct causing the injury may forfeit the right to compensation, except where the accident results in death or serious disablement. In Ontario there are two classes or schedules of industries, in one of which the employers contribute stated assessments to the compensation fund, in the other the employers pay the several claimants, through the Board, the amounts determined and levied by the Board as compensation for specific accidents as they occur.

The defences above referred to, of common employment, voluntary assumption of risk and contributory negligence, have been almost completely taken away, the test being whether the accident arose out of and in the course of the employment. As the various Workmen's Compensation Acts are of general application to various industries and therefore have no exclusive relation to railways, it is not convenient here to deal with them in detail.

Legislation of this nature falls within the category of laws relating to "property and civil rights" and therefore, under the British North America Act, 1867, it is within the powers of the Provinces to enact it and to make it applicable to Dominion as well as Provincial Railways. See "General Remarks on sections 5 to 8," *supra*; **Canada Southern Ry. Co. v. Jackson**, 17 S.C.R. 316.

In Manitoba, it was held by Mathers, C.J., that the Workmen's Compensation Board of that Province was a Court and was illegally constituted as its members had been appointed by the Province and not by the Dominion as required by the B.N.A. Act. This decision was reversed on appeal. **Kowhanko v. Tremblay**, 50 D.L.R. 578, 51 D.L.R. 174.

Where a thing has been done under statutory powers, provided the exercise of the powers has not been negligent, there is no right of action. **Elliott v. Winnipeg Electric Ry. Co.**, 38 D.L.R. 201, 22 C.R.C. 258, 28 Man. L.R. 363.

Res Ipsa Loquitur. In some cases the maxim *res ipsa loquitur* is invoked in order to raise a presumption of negligence from the mere happening of the act complained of, as where, while plaintiff was walking along the street in front of a flour dealer's premises, he was injured by a barrel of flour falling from the upper window. In such a case the mere fact of the accident without proof of anything more, was evidence of negligence proper to go to the jury: **Byrne v. Boadle**, 33 L.J. Ex. 13. Where a brick fell out of a railway bridge which the defendants were bound to maintain and injured a passer-by, shortly after a train had passed, the maxim was invoked and the plaintiff recovered: **Kearney v. London, etc., Ry. Co.**, L.R. 5 Q.B. 411, 6 Q.B. 759; and so where a coach was overturned it was held that the plaintiff had done enough in giving proof of the accident and that the defendant must rebut the presumption of negligence arising from the circumstances: **Christie v. Griggs**, 2 Camp. 79. In all such cases, however, the presumption arising from the accident is not conclusive of negligence but may be rebutted: **Bird v. Great Northern Ry.**, 28 L.J. Ex. 3; *Sington on Negligence* 120, (2); the onus then being shifted upon the plaintiff to give affirmative proof of negligence: **Ferguson v. C.P.R.**, 12 O.W.R. 943. If a plaintiff tries to go beyond his plea of *res ipsa loquitur* and undertakes without success to show the specific cause of the accident he may waive the *prima facie* case on which he might otherwise have relied. **Curry v. Sandwich & Windsor Ry. Co.**,

18 D.L.R. 685, 19 C.R.C. 210. See note 19 C.R.C. 213. See also **Worsley v. C.N.R.**, 43 D.L.R. 287, 23 C.R.C. 385, 11 Sask. L.R. 473; **Rostrom v. C.N.R.**, 3 D.L.R. 392, 16 C.R.C. 168, 22 Man. L.R. 250.

Res ipsa loquitur can be invoked by a servant in Alberta, where the defence of common employment has been taken away by statute: **C.N.R. v. Horner**, 61 S.C.R. 547.

Res Gestae. In **Armstrong v. Canada Atlantic Ry.**, 1 C.R.C. 444, a statement made by the deceased at the time of the accident and shortly before his death, was admitted in evidence to explain the accident. The general subject of admitting statements made at the time of an accident is discussed in the notes to that case, 1 C.R.C. 448. In **Ohio, etc., Ry. v. Stein**, 19 L.R.A. 733, the evidence of statements made to the injured man by the engineer at the time of the accident was admitted as evidence and treated as being part of the **res gestae** and not merely hearsay evidence.

The case of **Armstrong v. Canada Atlantic Ry.** was over-ruled on other grounds by the Court of Appeal, 2 Can. Ry. Cas 339, but this point was not touched upon. In **Henry v. G.T.R.**, 4 O.W.R. 23, the subject was considered by MacMahon, J., who in the case of an accident at a station which resulted in the death of the plaintiff's husband was asked to admit evidence of statements made by the deceased after the accident and before his death to the effect that the defendant's station agent was to blame, and also evidence that, this being said in the presence of the agent, he did not deny it. It was decided, however, that such statements were made too long after the accident to be treated as part of **res gestae**.

Subsequent Change of Premises. After an accident has occurred attempts have sometimes been made to give evidence showing a subsequent change of premises in support of a theory that the premises were previously defective. It has been held, however, that the mere fact that after an accident the owner of the premises has made changes which he considers will be an improvement, is not evidence that the premises were previously defective and should not be admitted or allowed for consideration by a jury: **Hart v. Lancashire, etc., R.W. Co.**, 21 L.T.N.S. 261; **Cole v. C.P.R.**, 19 P.R. 105; **Pudsey v. Dominion Atlantic Ry.**, 27 N.S.R. 498. But see **Toll v. C.P.R.**, 8 C.R.C. 291, 294.

Contributory Negligence. Bowen, L.J., in **Thomas v. Quartermaine**, 18 Q.B.D. at page 694 defines contributory negligence as follows: "Contributory negligence on the part of an owner only means that he, himself, has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause." The subject is discussed at length in *Sington on Negligence*, pages 122 to 132, where various definitions of contributory negligence are given. The effect of contributory negligence at common law is to deprive the plaintiff of all right of action: **Phillips v. G.T.R.**, 1 C.R.C. 399. But the rule in Admiralty in England is in such cases to divide the damages, making the defendant therefore liable for only half the damages caused by him: *Sington*, page 124; **The Bernina**, 13 A.C. 1; and the same rule exists in Quebec in actions under the civil code: **C.P. R. v. Boisseau**, 2 C.R.C. 335, at p. 337; **Paquet v. Dufour**, 39 S.C.R. 332.

Some of the more recent cases on the subject of contributory negligence are: **London and Western Trusts Co. v. Lake Erie Ry.**, 5 C.R.C. 364; **G.T.R. v. Hainer**, 5 C.R.C. 59; **Preston v. Toronto Ry.**, 6 C.R.C. 249; **Moir v. C.P.R.**, 7 C.R.C. 380; **Hanna v. C.P.R.**, 7 C.R.C. 392; **Toronto Ry. v. King**, 7 C.R.C. 408; **Tinsley v. Toronto Ry.**, 17 O.L.R. 74, 8 C.R.C. 69, 90; **Gavin v. Kettle Valley Ry. Co.**, 43 D.L.R. 47, 23 C.R.C. 379; **Ramsey v. Toronto Ry. Co.**, 17 D.L.R. 220, 30 O.L.R. 127; **Clarey v. Ottawa Electric Ry. Co.**, 33 D.L.R. 586, 21 C.R.C. 231, 38 O.L.R. 308; **Ball v. Wabash Ry. Co.**, 26 D.L.R. 569, 20 C.R.C. 329, 35 O.L.R. 84; **Campbell v. C.N.R.**, 15 C.R.C. 31, 9 D.L.R. 777, reversed 12 D.L.R. 272, 23 W.L.R. 156; **Long v. Toronto Ry. Co.**, 15 C.R.C. 35, 10 D.L.R. 300. In **Cook v. G.T.R.**, 19 D.L.R. 600, 18 C.R.C. 150, 32 O.L.R. 108, it was laid down that where an act of contributory negligence has been established and the accident followed without the interposition of anything which severed the casual connection between the act and the accident, the plaintiff cannot recover.

The doctrine of "ultimate negligence" by which is meant negligence entitling a plaintiff to recover notwithstanding contributory negligence is proved, has been considered in **Brenner v. Toronto Ry.**, 6 C.R.C. 261, 8 C.R.C. 100, 108, 40 S.C.R. 540; **Loach v. B.C. Electric Ry. Co.**, 23 D.L.R. 4, 20 C.R.C. 309, (1916) 1 A.C. 719; **Ont. Hughes Owens v. Ottawa Electric Ry. Co.**, 39 D.L.R. 49, 23 C.R.C. 252, 40 O.L.R. 614; **Banbury v. Regina**, 35 D.L.R. 502, 21 C.R.C. 285, 10 Sask. L.R. 297; **Honess v. B.C.**

Electric Ry. Co., 36 D.L.R. 301, 21 C.R.C. 238, 23 B.C.R. 90; **Columbia Bitulithic v. B.C. Electric Ry. Co.**, 37 D.L.R. 64, 21 C.R.C. 243, 55 S.C.R. 1; **Smith v. Regina**, 34 D.L.R. 238, 21 C.R.C. 270, 10 Sask. L.R. 72, where it was held that the original act of negligence cannot also constitute "ultimate negligence" unless in spite of ability to discontinue, that original act is continued or repeated.

Infants. The rule as to contributory negligence cannot usually be invoked in the case of infants as it has been held, in most cases, that an infant cannot be expected to exercise the same degree of care as an adult and can therefore recover in cases where if the same accident had happened to an adult under similar circumstances, the latter would be without a right of action: **Farrell v. G.T.R.**, 2 C.R.C. 249, and notes; **Cummings v. Darngavil Coal Co.**, 5 F. (Ct. of Sess.) 513; **Sullivan v. Creed** (1904) 2 Ir. 317; **Tabb v. G.T.R.**, 4 C.R.C. 1; **Potvin v. C.P.R.**, *ibid.* 8; **Burtch v. C.P.R.**, 6 C.R.C. 461; but the infant may be disentitled to recover where the facts shew not merely negligence but active wrongdoing on his part. **McShane v. T.H. & B. Ry.**, 31 O.R. 185; **Newell v. C.P.R.**, 5 C.R.C. 372. **Hardy v. Central London Ry. Co.**, (1920) 3 K.B. 459; **Downing v. G.T.R.**, 58 D.L.R. 423, 19 O.W.N. 417, where an infant aged 8 was found guilty of negligence. See **Shilson v. Nor. Ont. Light & Power Co.**, 45 O.L.R. 449, in which the principle in **Cooke v. Midland Great Western**, (1909) A.C. 229 is discussed where an infant trespasser injured while playing on a turn table in a place where defendant's servants knew trespassing took place, distinguished in **Jenkins v. Great Western Ry. Co.** (1912) 1 K.B. 525, and **Latham v. Johnston** (1913), 1 K.B. 398, **Glasgow Corporation v. Taylor**, 38 T.L.R. 102. See also **Pedlar v. Toronto Power Co.**, 29 O.L.R. 527; Another class to which the same principle is applied is that of aged people from whom the same degree of care should not be expected as from ordinary persons: **Fraser v. Pictou County Electric Ry. Co.**, 28 D.L.R. 251, 20 C.R.C. 400, 50 N.S.R. 30.

Functions of Judge and Jury. In **Cameron v. Douglas**, 3 O.W.R. 817, it was said by Britton, J., that where the evidence was undisputed that the deceased knew of the danger he was incurring, there was nothing to submit to a jury and a non-suit must be granted even though the jury found that the deceased did not know or realize the risk he was undertaking. But the mere fact that the deceased must have known and appreciated the risk will not relieve the defendants if the jury is satisfied that he

did not freely agree to accept it: **Williams v. Birmingham, etc., Ry. Co.** (1899), 2 Q.B. 338; **Smith v. Baker**, (1891), A.C. 325.

The following general principles on this subject are suggested:

1. The judge must decide as a question of law whether the facts disclose any evidence of negligence proper to submit to a jury: **Cotton v. Wood**, 8 C.B.N.S. 568; **Hammack v. White**, 11 C.B.N.S. 588; **Drury v. North Eastern Ry.** (1901), 2 K.B. 322; **Lundy v. Dawson**, 3 O.W.R. 720; **Brown v. Waterous**, 8 O.L.R. 37.

2. Where, however, there is such evidence, the question is purely one for the jury and their finding will not be reversed merely because a judge may take a different view of the evidence: **Bridges v. North London Ry.**, L.R. 6 Q.B. 377, 7 H.L. 213; **Smith v. South Eastern Ry.** (1896) 1 Q.B. 178; **McArthur v. Dominion Cartridge Co.** (1905), A.C. 72, and a new trial will not be granted unless there is some misdirection or want of direction: **Henry v. Hamilton Brass Co.**, 3 O.W.R. 448; **Webb v. Canadian General Electric Co.**, 2 O.W.R. 865; 3 O.W.R. 853; **Sault Ste. Marie Pulp Co. v. Myers**, 33 S.C.R. 23: See also **Brenner v. Toronto Ry.**, 15 O.L.R. 195, (affirmed 40 S.C.R. 540), where the question of the right to a new trial on the ground of mis-direction is very fully considered.

An Appellate Court will not generally reverse the finding of a jury on the question of facts unless those findings are so erroneous as to shock a reasonable mind: **Titus v. Colville**, 18 S.C.R. 709; **The Reliance v. Conwell**, 31 S.C.R. 653; **Granby v. Menard**, *ibid.*, 14, and **McArthur v. Dominion Cartridge Co.**, *supra*.

3. If there are no facts which would justify a jury in finding a verdict in favor of plaintiff, and they appear to be carried away by sympathy so as to render a verdict contrary to the facts, their finding may be set aside as perverse and the action dismissed: **Hodson v. Toronto, etc., Ry. Co.**, 3 C.R.C. 289. But the disapproval of a judge who tried the case is not in itself sufficient ground to justify the verdict being set aside: **Grieve v. Molson Bank**, 8 O.R. 162, at pages 168 & 169.

4. If it is clear from the plaintiff's testimony that he might by the exercise of reasonable care have avoided the accident, and there is no evidence to the contrary, then it would appear that the judge should withdraw the case from the jury and grant a non-suit: **Davey v. London, etc.,**

Ry. Co., 11 Q.B.D. 213, 12 Q.B.D. 70; **Coyle v. Great Northern Ry. Co.**, 20 L.R. Ir. 409; **Phillips v. G.T.R.**, 1 C.R.C. 399; **O'Hearn v. Port Arthur**, 2 C.R.C. 173.

5. But where the facts, or proper inferences from the facts, are in dispute the question of contributory negligence is for the jury; **Morrow v. C.P.R.**, 21 A.R. 149; **White v. Barry Ry. Co.**, 15 Times L.R. 474; **Vallee v. G. T.R.**, 1 Can. Ry. Cas. 338. **Toronto Ry. Co. v. King**, 7 C.R.C. 408; **Tinsley v. Toronto Ry. Co.**, 17 O.L.R. 74; **Daynes v. B.C. Electric Ry. Co.**, 19 D.L.R. 266, 18 C.R.C. 146, 49 S.C.R. 58.

6. In **Brown v. London Street Ry. Co.**, 1 C.R.C. 385, it was said that the proper question to submit to a jury on the subject of contributory negligence is "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and, in order to provide for an affirmative answer, to put the further question "If so, in what respect do you think the plaintiff omitted to take reasonable care?"

Damages for Personal Injuries.

General Rule. In **Phillips v. L. & S. W. Ry. Co.**, 4 Q.B.D. 406, Cockburn, C.J., states the general rule as follows: "Generally speaking we agree with the rule laid down by Brett, J., in **Rowley v. London, etc., Ry. Co.**, L.R. 8 Ex. 231, an action brought under 9 & 10 Vic., cap. 93, (known as Lord Campbell's Act), that a jury in these cases must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider under all circumstances a fair compensation." "These are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent, expenses incidental to attempts to effect a cure or to lessen the amount of the injury; the pecuniary loss sustained through inability to attend to a profession or business as to which again the injury may be of a temporary character or may be such as to incapacitate the party for the remainder of his life." This quotation has been adopted in a number of cases including: **Johnston v. Great Western Ry.** (1904), 2 K.B. 250, where it was laid down in accordance with the decision in **Rowley v. London, etc., Ry.**, L.R. 8 Ex. 231, that in awarding damages for a prospective loss of income from professional or other earnings a jury was not to give

such a sum as if invested would produce the full amount of income which he would probably have earned but ought, in estimating the damages, to take into account the circumstances of life and other matters and to give the plaintiff what they considered under all circumstances a fair compensation for his loss. In **Central Vermont Ry. v. Franchere**, 35 S.C.R. 68, these cases are discussed by Nesbitt, J., at pages 75, 76 and 77, and the above decisions followed by him. See also **Staats v. C.P.R.**, 17 D. L.R. 309, 17 C.R.C. 38; **C.P.R. v. Roy**, 17 C.R.C. 46, Q.R. 22 K.B. 459.

Damages occasioned by the failure of the injured person to obtain proper medical treatment were held in **Vinet v. King**, 9 Ex. C.R. 352, to be not recoverable. In **Banks v. Shedden Forwarding Co.**, 11 O.L.R. 483, it was held that a father could recover for medical expenses incurred by him in the treatment of his son, a child of six years, irrespective of the relationship of master and servant being established.

The decision in **Phillips v. London & South Western Ry.** was affirmed, 5 Q.B.D. 78. In **Davidson v. Stuart**, 14 Man. L.R. 74, where the deceased was killed by an electric shock while working in the defendants' electric light works, and the plaintiffs were parents and sisters of the deceased, it was held that under the circumstances set out in that case there was nothing in the evidence to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased, and the verdict of the jury in favor of the plaintiffs was on that ground set aside, and it is stated by Killam, C.J., at page 81, that damages are not to be allowed for injury to the feelings of the sufferers but for the loss of a life of substantial or pecuniary benefit to the relatives entitled under the statute. The cases on the subject are later discussed in that decision, which was affirmed on other grounds by the Supreme Court in **Davidson v. Stuart**, 34 S.C.R. 215. In **Central Vermont Ry. Co. v. Franchere**, *supra*, Mr. Justice Nesbitt concurs with the rules laid down by Killam, C.J., in the **Davidson Case**. At common law the personal representative of the deceased person could not recover damages for his death, but by the various statutes set out in 2 C.R.C. 18, 19 and 21, this rule has been greatly modified. Under the existing statutes, damages which may be recovered are looked upon as distinct from those which the deceased might have had if he had survived his injuries; so much so, that though the personal representative may sue on

behalf of persons named in the statute, yet if there be no such persons living, or if they die before judgment is obtained, no damages can be recovered: **McHugh v. G.T.R.**, 2 Can. Ry. Cas. 7. Under the Manitoba Statute, R.S.M. cap. 26, no person can bring an action but the person named in that statute, i.e., the executor: **Pearson v. C.P.R.**, 12 Man. L.R. 112. In addition to the cases already mentioned, the case of **Runciman v. Star Steamship Line**, 35 N.B.R. 123, confirms the general rule already laid down, and therefore damages cannot be recovered for the death of a child or a son not earning anything unless there is some reasonable expectation of pecuniary benefit to the parent in the future capable of being estimated: **Green v. New York, etc., Ry. Co.**, 27 A.R. 32; **Mason v. Bertram**, 18 O.R. 1. There need not, however, in such an action be evidence of actual pecuniary benefit received from the deceased if there is a reasonable expectation of pecuniary benefit from the continuance of the life: **Rombough v. Balch**, 27 A.R. 32. **Taff Vale Ry. Co. v. Jenkins**, (1913) A.C. 1.

Illustrations of the measure of damages recoverable in the case of the death of a child are to be found in **Stephens v. Toronto R. Co.**, 5 C.R.C. 102; **Renwick v. Galt**, **Preston & Hespeler Ry. Co.**, 5 C.R.C. 376, and **McKeown v. Toronto Ry. Co.**, 19 O.L.R. 361; **Pedlar v. Toronto Power Co.**, 15 D.L.R. 684, 29 O.L.R. 527.

In such an action it is not sufficient for the plaintiff to prove that he has lost by the death of the deceased, a mere speculative possibility of pecuniary benefit; in order to succeed it is necessary for him to show that he has lost a reasonable probability of pecuniary advantage, and damages were refused for the death of a son four years old. **Barnett v. Cohen**, McCardie, J. (1921), 2 K.B. 461.

In estimating the value of the life of the deceased, although reference may perhaps be made in the evidence to the current tables of mortality used by insurance offices: **Camden v. Williams**, 11 Am. & Eng. Ry. Cas. (N.S.) 600, yet, as already stated in **Johnston v. Great Western Ry. Co.** (1904), 2 K.B. 250, a jury should not award a sum sufficient to give the plaintiff an annuity equal to the income which he would have earned had it not been for the accident. Damages to the estate of the deceased, for medical attendance, loss to business, mourning or funeral expenses, cannot be recovered: **Toronto Ry. v. Mulvaney**, 38 S.C.R. 327. **Dalton v. South Eastern Ry.**, 4 C.B.N.S. 296. Nor will damages be allowed to the plaintiffs for mental suffering or loss of the deceased's society:

C.P.R. v. Robinson, Mont. L.R. 2 Q.B. 25, 14 S.C.R. 105.

It is not open to the defendants to seek to reduce damages recoverable by the plaintiffs by the amount of life insurance moneys which they may have received on account of the death of the deceased: **Beckett v. G.T.R.**, 13 A.R. 174; **G.T.R. v. Beckett**, 16 S.C.R. 713; but in **G.T.R. v. Jennings**, 13 A.C. 800, affirmed **Jennings v. G.T.R.**, 15 A.R. 477, it was said by Lord Watson that while the amount of insurance received by the widow should not be taken into account, nevertheless the pecuniary benefit which accrued to her from her husband's premature death, consisting in the accelerated receipt of a sum of money, might be taken into consideration, and that in such a case the extent of the benefit might fairly be taken to be represented by the use or interest of that money during the period of acceleration, and that a jury might deduct from their estimate of the future earnings of the deceased the amount of premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy.

A different rule has been applied in regard to accident insurance. See **Hicks v. Newport**, noted in the report of **Pym v. G.N. Ry.**, 4 B. & S., at p. 403, where it was said that the proper method was for the jury to assess the damages irrespective of insurance and then deduct therefrom the amount recovered for accident insurance. This was referred to in **Farmer v. G.T.R.**, 21 O.R. 299. The rule does not apply in cases where the action is brought by the injured person himself. **Misner v. Toronto**, 11 O.W.R. 1064. And now in England by 8 Edw. VII., cap. 7, money payable under any contract of insurance is not to be taken into account in any action under the Fatal Accidents Act. See also R.S.O. cap. 151, sec. 4 (2). The rule is not the same in all the provinces.

Apportionment of Damages. The apportionment of damages between those relatives who are entitled within the terms of the statute, is made at the trial by the jury, if there is one, and if there is no jury, by the trial judge: **Burkholder v. G.T.R.**, 2 C.R.C. 5; which will illustrate the method adopted in making an apportionment and the considerations which influenced the Court. See also **Speers v. G.T.R.**, 3 O.W.R. 69, 4 O.W.R. 490.

Inadequacy of Damages. Generally speaking, as mentioned before, the verdict of a jury will not be disturbed on the ground that the damages are inadequate, any more than it will be disturbed because of their being

too large. See **Phillips v. London, etc., Ry. Co.** 42 L.T. 6; **Lambkin v. S.E. Ry. Co.**, 5 App. Cas. 352; and **Johnston v. Great Western Ry. Co.** (1904), 2 K.B. 250. In **Church v. Ottawa**, 25 O.R. 298, 22 A.R. 348, a verdict was set aside on the ground that the amount awarded was so small that it was evident that the jury must have overlooked some material element of damage in the plaintiff's case. In that case the plaintiff, who was a practising physician, earning a large income, had suffered to a considerable extent in his business, and the jury only allowed \$700, and therefore a new trial was granted. Unless it clearly appears to the Court that the smallness of the damages has arisen from a mistake on the part of either the Court or the jury, or from some unfair practice on the part of the defendant, a verdict will not be set aside, and the mere fact that it may be considered a compromised verdict, will not be sufficient ground for upsetting it, if it can be justified upon any hypothesis presented by the evidence: **Currie v. St. John Ry. Co.**, 3 C.R. C. 280. The Court of Appeal has no power to order, without the defendant's consent, that unless the plaintiff consents to reduce the damages there shall be a new trial. **Watt v. Watt**, (1905) A.C. 115.

Damages for Nervous Shock. Where a lady sustained personal injuries from a severe shock brought about by a gate-keeper of the defendants negligently inviting her to drive over a level crossing when it was dangerous to do so, and a collision between her carriage and a passing train was narrowly averted, it was held that the injury arose from mere sudden terror, without any physical injury, and that the damages were too remote: **Victorian Railway Commrs. v. Coultas**, 13 A.C. 222.

This case cannot now be regarded as law in any part of the United Kingdom. **Dulieu v. White**, (1901) 2 K.B. 669; **Ross v. Glasgow Corporation**, (1919), S.C. 174; **Bell v. G.N. Ry.** (1890) 26 L.R. Ir. 428, although it is still an authority in the British Dominions beyond the seas. It was followed in the Ontario Court of Appeal in **Henderson v. Canada Atlantic Ry. Co.**, 25 A.R. 437, affirmed 29 S.C.R. 632, and in **Filiatrault v. C.P.R.**, Q.R. 18 S.C. 491, it was held that damages for nervous shock caused to one of the family by her mother's death, being conjectural, indirect and remote, could not be recovered. The **Coultas** and **Henderson** cases were followed in **Geiger v. G.T.R. Co.**, 5 C.R.C. 85, 10 O.L.R. 511.

Orders and Regulations of Board.

287. (1) The Board may make orders and regulations,—

(a) limiting the rate of speed at which railway trains and locomotives may be run in any city, town or village, or in any class of cities, towns or villages; and the Board may, if it thinks fit, limit certain rates of speed within certain described portions of any city, town or village, and different rates of speed in other portions thereof; R.S., c. 37, s. 30 (a).

Speed of
trains.

See section 309 which lays down the ten-mile rule in certain cases.

(b) with respect to the use of the steam whistle within any city, town or village, or any portion thereof; R.S., c. 37, s. 30 (b).

Use of steam
whistle.

By section 308 the engine whistle shall be sounded at least eighty rods before reaching a highway crossing at rail level except within the limits of cities or towns when the municipal authority may pass by-laws prohibiting the same.

(c) with respect to the method and means of passing from one car to another, either inside or overhead, and for the safety of railway employees while passing from one car to another; R.S., c. 37, s. 30 (c).

Passing
from car
to car.

(d) for the coupling of cars; R.S., c. 37, s. 30 (d).

Coupling.

(e) requiring proper shelter to be provided for all railway employees when on duty; R.S., c. 37, s. 30 (e).

Shelter.

(f) with respect to the use on any engine of nettings, screens, grates and other devices, and the use on any engine or car of any appliances and precautions which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of the railway; R.S., c. 37, s. 30 (f).

Prevention
of fires.

The Board has no jurisdiction to require railway companies to provide suitable quarters at divisional and terminal points for engineers and firemen. **Re Brotherhood of L.E., 11 C.R.C. 330.**

The words "respecting the construction, use and maintenance of any fire guards or works" which formerly appeared in this section after the word "precautions" will now be found in section 281 (1) (a), **ante.**

The observance of this provision does not appear to assist the company in disputing liability under section 387 where the damages do not exceed \$5,000.

Protection
generally.

(g) with respect to the rolling stock, apparatus, cattle-guards, appliances, signals, methods, devices, structures and works, including light, heat or power, lines or wires, to be used upon the railway, so as to provide means for the due protection of property, the employees of the company, and the public and all persons travelling on His Majesty's service.

See **Flag Station Case**, 8 C.R.C. 151.

As to foreign cars see **Stone v. C.P.R.**, 15 C.R.C. 408, 13 D.L.R. 93, 47 S.C.R. 634.

A General Order under this section held not retroactive so as to compel removal of structures erected in accordance with a previous order. **Clark v. C.P.R.**, 14 C.R.C. 51, 2 D.L.R. 331. Company held not liable for injury to a brakeman who came in contact with a stand pipe erected in accordance with an order of the Board. **Ibid.**

Length of
sections, etc.

(h) with respect to the length of sections required to be kept in repair by employees of the company, and with respect to the number of employees required for each section, so as to ensure safety to the public and to employees; 1917, c. 37, s. 5.

Number
of men.

(i) designating the number of men to be employed upon trains, with a view to the safety of the public and of employees; R.S., c. 37, s. 269 (a). Am.

The last words beginning "with a view, etc," are new.

Hours of
duty.

(j) limiting or regulating the hours of duty of any employees or class or classes of employees, with a view to the safety of the public and of the employees.

Fuel.

(k) providing that a specified kind of fuel or a specified kind of power or method or means of propulsion shall be used on any or all locomotives and trains in any district; and,

Motive
power

R.S., c. 37, s. 269 (b) read, "providing that coal shall be used instead of wood on all locomotives in any district."

(1) generally providing for the protection of property, and the protection, safety, accommodation and comfort of the public, and of the employees of the company, in the running and operating of trains and the speed thereof, or the use of engines, by the company or on or in connection with the railway. R.S., c. 37, s. 269 (c). Safety, etc.

The words at the end, beginning "and the speed thereof," etc., are new.

In the absence of authority requiring company to cover the switch rods of hand switches, it is not open to a jury to find that failure to do so is negligence. **Mallory v. Winnipeg Joint Terminals**, 22 D.L.R. 448, 18 C.R.C. 277.

Company held liable for death of fireman in a collision while the snowplough on which he was riding was in charge of a signalman who had not passed the usual eye and ear tests, without proof of the signalman's negligence or incapacity, or of the accident having in fact resulted therefrom: **Jones v. C.P.R.** (Privy Council), 13 D.L.R. 900, 16 C.R.C. 305, 30 O.L.R. 331.

The Board has jurisdiction over all clearances on Dominion railways: **Hydro Electric Power Commission v. L. & P.S. Ry.**, 17 C.R.C. 326.

Applications to the Board as to clearances, etc., under General Order of the Board, No. 65, should be made by the railway concerned and not by the industry affected. **Re General Order 65**, 16 C.R.C. 412.

A switchstand is not a "fixed signal" within the meaning of the train rules: **C.P.R. v. Walker**, 43 D.L.R. 698, 23 C.R.C. 399, 57 S.C.R. 493.

Company held liable for damages from having a switchstand too near, in the jury's opinion, to the track. **Herman v. C.P.R.**, 23 C.R.C. 416, 44 D.L.R. 343.

As to the Board's jurisdiction to control operation of railway so as to lessen noise or other public inconvenience see **Toronto v. C.N.R.**, 21 C.R.C. 452.

(2) Any orders or regulations under this section may be made applicable during or after the construction of the railway, or during such time, and in such manner, as the Board deems proper. R.S., c. 37, s. 30, **part**, s. 269, s. 275, **part**; 1909, c. 32, s. 13, **part**; 1917, c. 37, s. 5. Am.

Uniformity.

288. The Board shall endeavor to provide for uniformity in the construction of rolling stock to be used upon the railway, and for uniformity of rules for the operation and running of trains. R.S., c. 37, s. 268. Am. Identical with former section 268.

Payment
of salary
or wages.

289. The salary or wages of every person employed in the operation, maintenance or equipment of any railway to which the Parliament of Canada has granted aid by means of subsidy or guarantee shall be paid not less frequently than semi-monthly during the term of employment of such person. 1917, c. 37, s. 1.

The Board has no jurisdiction to require payment of wages of injured employees during recovery: **Re Brotherhood of L.E.**, 11 C.R.C. 330.

By-Laws, Rules and Regulations of Company.

Company
may make
by-laws.

290. The company may, subject to the provisions and restrictions in this and in the Special Act contained, and subject to any orders or regulations of the Board made under sections two hundred and eighty-seven and two hundred and eighty-eight, make by-laws, rules or regulations respecting,—

Speed.

(a) the mode by which, and the speed at which any rolling stock used on the railway is to be moved;

Time tables.

(b) the hours of arrival and departure of trains;

Loads.

(c) the loading and unloading of cars, and the weights which they are respectively to carry;

Traffic.

(d) the receipt and delivery of traffic;

Nuisances.

(e) the smoking of tobacco, expectorating, and the commission of any nuisance in or upon trains, stations, or other premises occupied by the company;

Operation.

(f) the travelling upon, or the using or working of the railway;

Officers and
employees.

(g) the employment and conduct of the officers and employees of the company; and,

Management.

(h) the due management of the affairs of the company. R.S., c. 37, s. 307. Am.

The reference to orders and regulations of the Board in the third, etc., lines is new.

With these provisions should be compared the power conferred upon directors by section 122, *ante*, to pass by-laws for the internal management of the company, and notes to that section.

The above enactment is in effect the same as section 214 of the Act of 1888. The word "traffic" in sub-section (d) has been substituted for "goods and other things which are to be conveyed upon such carriages," and is now wide enough to include passengers; section 2 (33). The word "expectorating" is now added after "tobacco" in clause (e). Corresponding English legislation exists in 3 and 4 Vict., cap. 99, secs. 7, 8 and 9, and in 8 Vict., cap. 20, sections 108, 109, 110 and 111.

The effect of by-laws of this character upon the public was considered in **London Ass'n., etc. v. London & India Docks** (1892), 3 Ch. 242; which was a case where by-laws were enacted and circulated regulating the use of defendants' docks without obtaining the necessary approval required by statute. Plaintiffs having brought an action to declare these by-laws illegal, it was held that, as they could show no special damage to themselves as individuals, they had no *locus standi*; as such an action should have been brought by the Attorney-General as representing the public.

It was held, however, that as the by-laws had not been properly approved they were not binding, except so far as the plaintiffs or other customers may have accepted them. At p. 252, Lindley, L.J., says: "This power of making by-laws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it. A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body and intended to bind not only themselves and their officers and servants, but the members of the public who come within the sphere of their operation, may be properly called 'by-laws' whether they be valid or invalid in point of law; for the term by-law is not restricted to that which is valid in point of law." This was quoted with approval in **Barraclough v. Brown** (1897), A.C. 615, at p. 624. In **Kruse v. Johnston** (1898), 2 Q. B. 91, at p. 99, Lord Russell draws a distinction between by-laws passed by public representative bodies and those passed by "railway companies, dock companies or other like companies, which carry on their business for their own profit although incidentally for the advantage of the public. In this class of cases it is right that the

Courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage." He thinks that those by-laws passed by local governing bodies should be "benevolently" interpreted; but even in such cases if they were partial, unequal or manifestly unjust, disclosed bad faith, or involved oppressive or gratuitous interference with the rights of those subject to them, they would be deemed to be unreasonable and **ultra vires**, but otherwise effect should be given to them, even though in the opinion of individual judges, they went further than was prudent or necessary. But by-laws should be clear and definite and free from ambiguity and should not make unlawful, things which are otherwise innocent: **Scott v. Pilliner** (1904), 2 K.B. 855, at p. 858; see **Queen v. Levy**, 30 O.R. 403.

Where a navigation company was empowered to make by-laws for the good government of the company, the good and orderly using of navigation and the well-governing of the boatmen, etc., carrying goods, this was construed to mean only that it could enact by-laws for the orderly use of navigation so as to best secure the convenience of the public and that they could not make rules respecting "the regulation of moral or religious conduct, which are left to the general law of the land and to the law of God;" and therefore, they could not enforce a "Sabbath observance" regulation passed by them: **Calder v. Pilling**, 14 M. & W. 76. Where by-laws are authorised for the protection of the company, as in the case in England of by-laws imposing penalties for non-payment of fare and production of a ticket, the company must, in order to avail itself of them, keep strictly within their provisions: **Jennings v. Great Northern Ry. Co.**, L.R. 1 Q.B. 7, and if a by-law requires evidence of fraud, the penalties for non-observance of it, cannot be exacted unless fraud is shown: **Dearden v. Townsend**, *ib.*, 10, and any by-law enacted in terms wider than those authorised by the statute under which it is passed, will be invalid: **Dearden v. Townsend**. So also must all conditions precedent to the enforcement of the penalties be proved: **Brown v. Great Eastern Ry. Co.**, 2 Q.B.D. 406, and see **Bentham v. Hoyle**, 3 Q.B.D. 289.

In **Saunders v. South-Eastern Ry. Co.**, 5 Q.B.D. 456, Cockburn, C.J., at p. 459, in discussing the corresponding clauses of the English Act, thought that they had reference to a time when railways were compelled to permit the use of their lines by locomotives and carriages other

than their own and that the provisions for regulating the rate of speed, the starting and stoppage of trains, the receipt and delivery of goods, the loading and unloading of cars, and the weight which they were to carry, and the travelling upon and using the railway, all had reference to the use of the line by others, because, as regards its own rolling stock, trains and traffic, a company had ample power to regulate it without recourse to the statute; and on that account he thought, though it was not decided, that the clause corresponding to clause (f) above had no reference to the case of persons travelling in the company's own carriages. In view of other decisions noted herein, this view, though perhaps historically correct, would hardly apply to railways operating under existing conditions. If a by-law is in part repugnant to the statute under which it was passed, the whole of it is invalid: **Dyson v. London, etc., Ry. Co.**, 7 Q.B.D. 32, and see **Huffam v. North Staffordshire Ry. Co.** (1894), 2 Q.B. 821. A by-law passed under proper legislative authority requiring a person to deliver up a ticket or pay his fare and imposing a penalty for disobedience is reasonable and if a person who got a ticket, loses it and refuses to pay his fare over again and is convicted, the conviction will be upheld: **Hanks v. Bridgman** (1896), 1 Q.B. 253; **Lowe v. Volp** (1896), 1 Q.B. 256; **Hunt v. Green**, 96 L.T. 23, 21 Cox C.C. 333. Where a statute empowered a company to pass by-laws prohibiting a nuisance in their cars, and they enacted that "no person shall swear or use offensive or obscene language whilst in or upon any carriage," the by-law was upheld even though it did not contain any such additional words as "so as to be a nuisance or annoyance to others." The case of **Strickland v. Hayes** (1896), 1 Q.B. 290, dealing with the same subject was discussed and distinguished: **Gentel v. Rapps** (1902) 1 K.B. 161. No by-law will be open to the objection that it is unreasonable if it is in the very terms of the enabling Act: **Queen v. Petersky**, 4 B.C.R. 385.

As to the liability of railway companies for damages arising from the breach of its rules and regulations the following cases are of interest:

Where an employee brought an action against the company for damages resulting from a breach of a statutory duty, it was shown that the plaintiff had been guilty of contributory negligence by disobedience of the rules and regulations of the company. **Deyo v. Kingston & Pembroke Ry. Co.**, 8 O.L.R. 588; **Fawcett v. C.P.R.**, 32 S.C.R. 721.

But as to the liability of the company for damages arising from the neglect of a fellow-employee in the Province of Quebec: see **Regina v. Grenier**, 30 S.C.R. 42, 2 C.R.C. 409; followed in **G.T.R. v. Miller**, 34 S.C.R. 45, 3 Can. Ry. Cas. 147.

Under the rules of the Grand Trunk Ry. Co., "Conductors and engineers will be held responsible for violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains, even if not provided for in their rules." "Engine-men must obey a conductor's order as to starting their trains unless such order involves a violation of the rules, or endangers the train's safety." "Engineers are forbidden to leave the engine except in cases of necessity." "A train must not pass from double to single track until it is ascertained that all trains due which have a right of way have arrived or left."

The plaintiff was engineer on train about to pass from double to single track; he asked the conductor if it was all right to go, and receiving from him the usual signal to start he proceeded about two miles, where his train collided with another and he was injured. It was held that he was not obliged to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone; that he was bound to obey the conductor's order to start the train, and was therefore not guilty of contributory negligence. **G.T.R. v. Miller**, 32 S.C.R. 454, 2 C.R.C. 350.

A railway company is liable to the public for damages occasioned by disobedience of its rules and regulations by its employees. **C.P.R. v. Lawson**, Cassel's Digest (2nd Ed.) 729.

Penalty
may be
prescribed.

291. The company may, for the better enforcing of the observance of any such by-law, rule or regulation, thereby prescribe a penalty enforceable on summary conviction, not exceeding forty dollars for any violation thereof. 1917, c. 37, s. 11.

By section 448, sub-section 1, where any penalty is one hundred dollars or less, it may be recovered on summary conviction before a Justice of the Peace. This is similar to the English legislation, 8 Vict., cap. 20, sec. 145; and under it, the case of **London, etc., Ry. Co. v. Watson**, 4 C.P.D. 118, decided that such penalties must be recovered in the manner pointed out in the Act, and not by action in the County Court: see also **Reg. v. Paget**, 8 Q.B.D. 151.

292. All by-laws, rules and regulations, whether made by the directors or the company, shall be reduced to writing, be signed by the chairman or person presiding at the meeting at which they are adopted, have affixed thereto the common seal of the company, and be kept in the office of the company. R.S., c. 37, s. 309.

To be in
writing
under
common seal.

Under R.S.M. cap. 100, sec. 336, a similar provision of the Municipal Act was held to be imperative and an instrument not sealed or signed as provided by statute would not be a by-law: **Re Municipality of Whitewater**, 14 Man. L.R. 153.

293. (1) All such by-laws, rules and regulations, except such as relate to tolls and such as are of a private or domestic nature and do not affect the public generally, shall be submitted to the Governor in Council for approval.

Must be
approved
by
Governor
in
Council.

(2) The Board shall make a report to the Governor in Council upon such by-laws, rules and regulations, and the Governor in Council may thereupon sanction such by-laws, rules and regulations or any of them, or any part thereof, and may, from time to time, rescind the sanction thereof, or of any part thereof.

Board to
report.

(3) No such by-law, rule or regulation shall have any force or effect without such sanction, or after such sanction has been rescinded. R.S., c. 37, s. 310, 1917, c. 37, s. 12.

No effect
without
sanction.

The words "or after such sanction has been rescinded," were added by 1917, c. 37, s. 12.

This requirement is also no doubt essential, see **Village of Pointe Gatineau v. Hanson**, Q.R. 10 K.B. 346. **Fralick v. G.T.R.**, 43 S.C.R. 494.

294. Such by-laws, rules and regulations when so approved shall be binding upon, and shall be observed by all persons, and shall be sufficient to justify all persons acting thereunder. R.S., c. 37, s. 311.

Binding
when
approved.

295. (1) A printed copy of so much of any by-law, rule or regulation, as affects any person, other than the shareholders, or the officers or employees of the company, shall be openly affixed, and kept affixed, to a conspicuous part of every station belonging to the company, so as to

Printed copy
to be
posted up.

give public notice thereof to the persons interested therein or affected thereby.

Copy to every officer and employee affected.

(2) A printed copy of so much of any by-law, rule or regulation as relates to the conduct of or affects the officers or employees of the company, shall be given to every officer and employee of the company thereby affected.

In Quebec both languages.

(3) In the province of Quebec every such notice, by-law, rule and regulation shall be published both in the English and French languages. R.S., c. 37, s. 312.

In order to convict any one guilty of a breach of the by-law, it would no doubt only be necessary to prove publication of the by-law at such places and in such manner, conformably with the statute, as would affect the person accused with notice of it: **Motteram v. Eastern Counties Ry. Co.**, 7 C.B.N.S. 58.

Company may enforce.

296. If the violation or non-observance of any by-law, rule or regulation, is attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company may summarily interfere, using reasonable force, if necessary, to prevent such violation, or to enforce observance, without prejudice to any penalty incurred in respect thereof. R.S., c. 37, s. 313.

Evidence of by-law or regulation.

297. A copy of any such by-law, rule or regulation of the company, certified as correct by the president, secretary or other executive officer of the company, and bearing the seal of the company, shall be evidence thereof. R.S., c. 37, s. 76.

Equipment of Cars and Locomotives.

Modern and efficient appliances.

298. (1) Every railway company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means,—

Communication.

(a) to provide immediate communication between the conductor while in any car of any passenger train, and the engine driver;

Brakes.

(b) to check at will the speed of the train, and bring the same safely to a standstill, as expeditiously as possible, and, except under circumstances of

sudden danger or emergency, without causing undue discomfort to passengers, if any, on the train; and,

- (c) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars. Couplers.

Company held not liable for accident due to ice jamming coupler, when customary inspection failed to disclose condition: **Phelan v. G.T.R.**, 18 C.R.C. 233, 23 D.L.R. 90, 51 S.C.R. 113.

- (2) Such apparatus, appliances and means for the checking of speed or the stopping of any train shall include a power drive wheel brake and appliances for operating the train brake system upon the locomotive. Drive wheel brake.

- (3) There shall also be such a number of cars in every train equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, or bring the train to a stop in the quickest and best manner possible, without requiring brakemen to use the common hand brake for that purpose. Power or train brakes.

- (4) Upon all trains carrying passengers such system of brakes shall be continuous, instantaneous in action, and capable of being applied at will by the engine driver or any brakeman, and the brakes must be self-applying in the event of any failure in the continuity of their action. Continuous, instantaneous action.

- (5) All box freight cars of the company shall, for the security of railway employees, be equipped with,— Box freight cars.

- (a) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and, Outside ladders.

- (b) hand grips placed anglewise over the ladders of Hand grips.

each box car and so arranged as to assist persons in climbing on the roof by means of the ladders:

Proviso.

Provided that, if there is at any time any other improved side attachment which, in the opinion of the Board is better calculated to promote the safety of the train hands, the Board may require any of such cars not already fitted with the side attachments by this section required, to be fitted with the said improved attachment.

Height of
draw-bars.

(6) Every railway company shall adopt and use upon all its rolling stock such height of draw-bars as the Board determines, in accordance with any standard from time to time adopted by competent railway authorities.

Delay may
be allowed
for com-
pliance.

(7) The Board may upon good cause shown, by general regulation, or in any particular case, from time to time grant delay for complying with the provisions of this section.—R.S., c. 37, s. 264.

For similar legislation in the United States see 27 Statutes at Large, 531, amended by 29 Statutes at Large 85 and 32 Statutes at Large 943, also 36 Statutes at Large 298 and amendment, ditto 1397. See **Johnson v. Southern Pacific Ry. Co.**, 25 Sup. Ct. Reporter, 158. This subsection is substantially the same as section 211 of the Act of 1903. Prior to that Act the provisions of this section 243 in the Act of 1888 applied only to passenger trains. The present section is applicable to all trains except sub-section 4 which applies only to passenger trains. Many of the cases cited in former editions relating to accidents to employees are no longer of practical value since the enactment of the Workmen's Compensation Acts, and are not here repeated.

The statute is express in requiring the use of modern appliances, but the question has sometimes arisen how far a railway company is bound to employ the latest devices for the safety of its employees or passengers. In **Black v. Ontario Wheel Co.**, 19 O.R. 578, it is laid down that those using dangerous machinery must see that it is reasonably safe and that the appliances are such as are in use by prudent persons, but that they are not necessarily bound to use the very latest changes and improvements: see also **Butler v. Birnbaum**, 7 T.L.R. 287, Elliott on Railways, vol. 3, pages 2007 and 2058; but it is the duty of a railway company to employ whatever system is in general use and is supposed to be the best system even if not the latest, and as applied to brakes this duty is not confined

to passengers, but applies also for the benefit of persons lawfully crossing the railway tracks: **Smith v. New York, etc., Ry. Co.**, 19 N.Y. 127; **Gagg v. Vetter**, 41 Ind. 228. In England it has been held that a company is not liable for defects in the brake of a borrowed car where the company borrowing it has used all reasonable precautions to see that it is safe: **Caledonian Ry. Co. v. Mullholland** (1898), A.C. 216, but if the defect exists in direct breach of the statute the company who borrowed the car would probably be liable: **Atcheson v. G.T.R.**, 1 C.R.C. 490. If air brakes are not applied a sufficient distance from the crossing to permit the efficient application of hand brakes in the case of the air brakes failing to work, the company may be guilty of negligence and liable for injuries to persons injured: **Great Western Ry. Co. v. Brown**, 3 S.C. R. 159. Where a car was left with the brakes set so that it would not move, but the brakes were loosened by trespassers, and the car got upon the highway and caused injury to another, it was held that the railway company was not liable: **McDowall v. Great Western Ry. Co.** (1903), 2 K.B. 331; **Toronto Hydro Electric Commission v. Toronto Ry. Co.**, 45 O.L.R. 470, 48 D.L.R. 103, 25 C.R. C. 224.

In **C.P.R. v. Frechette**, 22 D.L.R. 356, 1915, A.C. 871, it was held that there is no duty on a company to equip its cars with the very latest improved couplers immediately after they are put on the market, and that the equipment with couplers used extensively by other companies and approved by the Railway Board was a sufficient compliance with the Act; but where such use is obligatory it has been held negligence for a company to haul a car belonging to a foreign company which is equipped with a coupling lever so short that it could not be operated without going in between the cars: **Stone v. C. P.R.**, 47 S.C.R. 634, 13 D.L.R. 93, 15 C.R.C. 408.

Tail Lights. The absence of tail lights on a train moving backwards may be evidence of negligence sufficient to justify a verdict in favor of the plaintiff: **C.P.R. v. Boisseau**, 2 C.R.C. 335; and where the light in front of a street car passing along a street on a dark night was dim, this was admitted as sufficient to warrant the plaintiff in claiming that the defendants were negligent: **Ford v. Metropolitan Ry. Co.**, 2 C.R.C. 187.

299. The Board may, by general regulation or upon application in any particular case, after hearing on notice, order that any apparatus or appliances specified in

Board may
determine
what
equipment
sufficient.

such regulation or order shall or shall not be deemed sufficient compliance with the provisions of the last preceding section, or that any apparatus or appliances specified in such regulation or order shall or shall not, when used upon the train in the manner and under the circumstances in such regulation or order specified, be deemed sufficient compliance with the provisions of the said section. R.S., c. 37, s. 265. Am.

Former section 265 provided only for the making, upon application, of orders that certain apparatus or appliances be deemed sufficient compliance with the provisions of the preceding section.

Oiling.

300. The oil cups or other appliances used for oiling the valves of every locomotive in use upon any railway shall be such that no employee shall be required to go outside the cab of the locomotive, while the same is in motion, for the purpose of oiling such valves. R.S., c. 37, s. 266.

Bell and whistle.

301. Every locomotive engine shall be equipped and maintained with a bell of at least thirty pounds weight and with a steam whistle. R.S., c. 37, s. 267.

See notes to section 308, *infra*.

Running of Trains.

Regularity in train time.

302. (1) All regular trains shall be started and run, as nearly as practicable, at regular hours, fixed by public notice. R.S., c. 37, s. 270.

Time tables in both languages.

(2) Every railway company shall print in both the English and French languages the time tables that are to be used along its lines within the limits of the Province of Quebec. 1909, c. 32, s. 14. Am.

Delay to Passenger—Time Tables. For passenger business, time tables are usually issued, giving the times at which trains arrive and depart. While a contract to carry from A. to B. must without some condition to the contrary, be literally performed and cannot be satisfied by landing the passenger at another point near B.: **Hobbs v. London, etc., Ry. Co.**, L.R. 10 Q.B. 111, yet the mere issue of a ticket from A. to B. apart from any conditions in the time bill, implies no warranty that a train will start at the time at which the passenger is led to expect it, and

if the train arrive too late to enable him to make connections and complete a through journey, he cannot recover damages: **Hurst v. Great Western Ry. Co.**, 19 C.B.N.S. 310, and see **Woodgate v. Great Western Ry. Co.**, 1 Times L.R. 133, and **Driver v. London, etc., Ry. Co.**, 16 Times L.R. 293; but where a company issued time bills showing connections with another line after they knew that the connecting train had been discontinued, they were liable, on the ground that the circulation of the time tables amounted to a representation on the company's part that there was a train, which was false to the knowledge of the defendants and was calculated to induce the plaintiff to act as he did: **Denton v. Great Northern Ry. Co.**, 5 E. & B. 860. Where a time bill announced that a train would arrive at certain hours and it did not arrive then or within a reasonable time thereafter, the plaintiff was held entitled to recover nominal damages and such other damages of a pecuniary kind as he may really have sustained as a direct consequence of the breach of contract, and that not having communicated to the defendants his desire to connect with another train and to meet his customers in another town he could not recover damages for failure to carry out his purpose: **Hamlin v. Great Northern Ry. Co.**, 1 H. & N. 408. This case was discussed in **Hurst v. Great Western Ry.**, 19 C.B.N.S. 310, and it was pointed out by Willes, J. (page 316), that since that case and the case of **Denton v. Great Northern Ry.** (1856), the railway companies have protected themselves by inserting in their time bills a notice to the effect that they do not guarantee the arrival or departure of the train at the exact time stated in the time table, but will do their best to insure punctuality. In **Briggs v. G.T.R.**, 24 U.C.R. 510, where plaintiff pleaded the time table as a representation of the arrival and departure of a train on which he desired to travel, it was held on demurrer and without proof of any such clause as was discussed in the **Hurst Case**, that the time table was not to be taken as importing a condition into the contract and that it amounts to a representation only and not to an integral part of the contract. Similarly an advertisement that a train runs from A. to B. so as to correspond with trains from B. to C. is not a warranty of punctuality, but a mere representation of the intended arrival of the trains: **Lockyer v. International, etc., Co.**, 61 L.J.Q.B. 501. In a time table the defendants stated that "Every attention would be paid to ensure punctuality so far as it is practicable," but that they would not undertake that the trains would arrive or start at the time specified. It was held by a maj-

ority of the Court of Common Pleas that the words quoted imported a contract to use due attention to keep the times specified in the time bills so far as practicable having regard to the necessary exigencies of the traffic and circumstances over which the company had no control: **Le Blanche v. London, etc., Ry.**, 1 C.P.D. 286. The case gave rise to a good deal of discussion amongst the judges and it is important here, because the words quoted imposed about the same liability upon the company under the contract as the above section imposes on railway companies in Canada. After the decision in **Le Blanche v. London, etc., Ry.**, the railway companies left out the words quoted and without them the liability of a railway company for the statements contained in its time bills was somewhat modified: **McCartan v. North Eastern Ry.**, 54 L.J.Q.B. 441, and in **Driver v. London, etc., Ry.**, 16 Times L.R. 293, the Court had to consider a condition in a time table which read "The directors give notice that the Company do not undertake that the trains shall start or arrive at the times specified in the bills. * * * The Company will not be accountable for any loss, inconvenience or injury which may arise from delays to or detention of passengers caused by the negligence of the servants of the Company or from any other cause whatsoever." The action based upon this clause was dismissed as no negligence was shown and the question whether the clause was sufficient to relieve the company from damages for delay caused by its negligence was not decided. The point again came up in **Duckworth v. Lancashire, etc., Ry. Co.**, 84 L.T.N.S. 774, where under a condition which provided that the defendants would not under any circumstances be held responsible for delay or detention however occasioned or any consequences arising therefrom, the defendants were absolved from liability even though negligence had been admitted. Lord Alverstone in that case stated that "there is no limit to the conditions which may be imposed by railway companies in regard to passenger traffic." This appears also to be the result arrived at in an article entitled "Delays to Passengers on Railways," 110 Law Times Journal 212, where the cases are discussed, but it must be remembered that there is no section in the English statutes similar to sec. 312, sub-sec. 7, **post**, which, in certain cases, prohibits railways from entering into contracts relieving them from the consequences of their negligence.

Sec. 7 of The Railways and Canal Traffic Act, 1854, though analogous in some respects, does not extend to the carriage of passengers.

The provision for the regularity of trains being now embodied in section 302, and sub-sec. 7 of section 312, referring only to failure "to comply with the requirements of this section," it may be that the principle of the English decisions would be applied.

Delay in Delivering Goods. In the absence of a special contract, the carrier is bound to deliver goods within a reasonable time looking at all the circumstances of the case; but he is not bound, unless he agrees to do so, to deliver them within any certain time and he is not responsible for the consequences of delay arising from causes beyond his control: **Taylor v. Great Northern Ry. Co.**, L.R. 1 C.P. 385. In that case the delay arose owing to an accident due entirely to the negligence of another company having running powers over the same line. A contract to carry by a particular train which usually arrives at a certain hour does not amount to a warranty that a train will so arrive even though the company has been informed that the object of the sender requires that it should do so: **Lord v. Midland Ry.** L.R. 2 C.P. 339; but the fact that the train arrives several hours after proper time is **prima facie** evidence of delay in carrying goods and requires explanation from the company: **Roberts v. Midland Ry.**, 25 W.R. 323; and where defendants carried plaintiff's meat in the summer by a train which according to schedule, should have arrived at its destination in two hours, but instead arrived in twenty-four hours, this in the absence of excuse was held to be an unreasonable delay: **Delorme v. C. P.R.**, 11 Leg. News 106, and see **Pontbriand v. G.T.R.**, M.L.R. 3 S.C. 61. If the ordinary course of conveyance is departed from owing to the negligence of a servant, this would be evidence of unreasonable delay: **Wren v. Eastern Counties Ry.**, 1 L.T.N.S. 5. And if delay arises while goods are being carried off the usual or prescribed route the carrier may be liable: **Corby v. G.T.R.**, 6 O.W. R. 492.

Damages for Delay to Passengers. Where passengers are improperly delayed the principle upon which damages are allowed is "that if one person does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such cases (as the one in question) is to consider, whether, according to the ordinary habits of society, a person delayed on his journey under circumstances for which the company were not responsible

would have incurred the expenditure on his own account: **Le Blanche v. London, etc., Ry.**, 1 C.P.D. 286, and so a person who missed his connection through the fault of defendants in that case was not allowed the cost of a special train by way of damages. Where, however, defendants knew that a miller was bound for the London Corn Market, and failed to punctually run a train which was advertised specially for it, he was allowed both the cost of a special train and damages for losing his market which he failed to reach in time: **Buckmaster v. Great Eastern Ry.**, 23 L.T.N.S. 471. Where the delay is no fault of the defendants the cost of a special train will not be allowed: **Fitzgerald v. Midland Ry.**, 34 L.T.N.S. 771; **Thompson v. Midland Ry.**, 34 L.T.N.S. 34. Where a passenger has been dropped at a place short of his destination the cost of a conveyance to drive him home was allowed: **Great Northern Ry. v. Hawcroft**, 21 L.J.Q.B. 178; or if compelled to sleep elsewhere he might recover his hotel bill: **Hamlin v. Great Northern Ry.**, 1 H. & N. 408; and he may recover something for the inconvenience of having to walk home: **Hobbs v. London, etc., Ry.**, L.R. 10 Q.B. 111, or his wages if he arrives too late for his day's work: **Cooke v. Midland Ry.**, 57 J.P. 388; but nothing for loss of custom if he misses an appointment: **Hamlin v. Great Northern Ry.**, *supra*. If the probable consequence of the delay is to expose a person to inclement weather, and he catches cold and incurs medical expenses, damages for these consequences will be allowed: **Hobbs v. London, etc., Ry.**, *supra*; commented on and discussed **McMahon v. Field**, 7 Q.B.D. 591; **Toronto Ry. v. Grimsted**, 24 S.C.R. 570.

Damages for Delay to Goods. In this as in all other cases the damages recoverable must be such as might reasonably be expected to flow from a breach of the contract to carry in due time, and unless it is shewn that the carrier knew of any special consequences which would flow from delay, they cannot be compelled to pay any unusual damages: **Hadley v. Baxendale**, 9 Ex. 341; and where goods intended for market are delayed, the proper measure of damages is the difference in market price at the time when they should have arrived, and the time when they actually arrived, and, if in addition, they suffered deterioration on account of the delay, damages for that can also be recovered: **Collard v. South Eastern Ry.**, 7 H. & N. 79. Where cloth intended for a cap manufacturer was delayed a month on the road and the season for selling such caps had expired, the plaintiff was allowed as damages the diminution in the value of the

cloth on account of the loss of season, but not the loss of anticipated profits, nor the expenses of travellers despatched to sell the caps in expectation of the goods arriving in due time: **Wilson v. Lancashire, etc., Ry.**, 9 C.B. N.S. 633. In **Great Western Ry. v. Redmayne**, L.R. 1 C. P. 329, a traveller was sent to Cardiff to sell goods which were delayed until after he had left, the shipper sued for loss of profits, which he would have made on sales by his traveller, but such damages were considered too remote, as the carriers were not aware of the purpose for which they had been shipped; and a traveller who spent three days awaiting goods which were delayed was not allowed his travelling expenses during that period: **Woodger v. Great Western Ry.**, L.R. 2 C.P. 318. In the case of an article delivered to defendants and not forthcoming, it was held that plaintiff could only recover the value of the article and not loss of profits or the wages of workmen employed upon a building intended to receive it: **Ruthven. v. Great Western Ry.**, 18 U.C.C.P. 316. Where butter has been detained until a short time before the trial and a tender then made, the plaintiff was allowed as damages the whole value of the property and not merely the difference between the value at the time of detention and its value when tendered, because, under the special circumstances of that case, the tender was wholly illusory: **Brill v. G.T.R.**, 20 U.C.C.P. 440.

See notes to section 348 as to conditions in Bill of Lading approved by the Board governing claims of this nature.

303. Every company, upon whose railway there is a telegraph or telephone line in operation shall have a blackboard put upon the outside of the station house, over the platform of the station, in some conspicuous place at each station of such company at which there is a telegraph or telephone office; and when any passenger train is overdue at any such station, according to the time-table of such company, the station agent or person in charge at such station, shall write, or cause to be written, with white chalk on such blackboard, a notice stating, to the best of his knowledge and belief, the time when such overdue train may be expected to reach such station.

Blackboard.

At stations.

Overdue trains.

2. If there is any further change in the expected time of arrival the station agent or person in charge of the

Further notice.

station shall write, or cause to be written on the black-board in like manner, a fresh notice stating, to the best of his knowledge and belief, the time when such overdue train may then be expected to reach such station.

English and French.

3. Such notices shall, in the Province of Quebec, be written in the English and French languages, and, in the other provinces, in English. R.S., c. 37, s. 271. Am.

The penalty for breach of the provisions of this section is now to be found in section 415.

Position of passenger cars.

304. No passenger train shall have any freight, merchandise or lumber car in the rear of any passenger car in which any passenger is carried. R.S., c. 37, s. 272.

Prior to the Act of 1903 this provision applied also to baggage cars. Under the present section there is nothing to prevent a train being made up with a baggage car in the middle, the rear, or elsewhere. The section, of course, is aimed at mixed trains, in which both passenger and freight cars appear.

The penalty for violation of this section is to be found in section 416, which provides that "every officer or employee of any company, who directs or knowingly permits any freight, merchandise or lumber car to be placed in the rear of any passenger car, in which any passenger is carried, is guilty of an indictable offence."

Precautions at Swing Bridges.

Trains to stop at swing bridges.

305. (1) When any railway passes over any navigable water, or canal, by means of a draw or swing bridge, which is subject to be opened for navigation, every train shall, before coming on or crossing over such bridge, be brought to a full stop, and shall not thereafter proceed until a proper signal has been given for that purpose.

Board may exempt.

(2) Wherever there is adopted or in use on any railway, at any such bridge, an interlocking switch and signal system or other device which, in the opinion of the Board, renders it safe to permit engines and trains to pass over such bridge without being brought to a stop, the Board may, by order, permit engines and trains to pass over such bridge without stopping, under such regu-

lations as to speed and other matters, as the Board deems proper. R.S., c. 37, s. 273.

For the penalties for breach of this section, see sections 417 and 418.

By the Act of 1888 trains were compelled to stop for one minute before crossing a swing bridge. It is now provided that they must stop and not proceed until a proper signal has been given.

The introduction of interlocking and derailling devices rendered possible the enactment of 55-56 Vic., cap. 27, sec. 7, and this now appears with certain changes, as sub-section 2 of this section. Section 245, *ante*, provides that no railway company shall obstruct navigable waters and therefore where they cross such waters swing or draw bridges are necessary, and the above section becomes applicable.

Conductor, not engineer, held responsible for negligence where precautions at swing bridge were neglected and engineer was drowned. *Smith v. G.T.R.*, 3 O.W.N. 379, reversed, 14 C.R.C. 49; restored, 14 C.R.C. 300; 8 D.L.R. 171.

Precautions at Railway Crossings.

306. (1). No train or engine or electric car shall pass over any crossing where two main lines of railway, or the main tracks of any branch lines, cross each other at rail level, whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine from a competent person or watchman in charge of such crossing that the way is clear.

Signal at
rail level
crossings.

(2) In the case of an electric car crossing any railway track at rail level, if there is no competent person or watchman in charge of the crossing, it shall be the duty of the conductor, before crossing and before giving the signal to the motorman that the way is clear and to proceed, to go forward and see that the track is clear. R.S., c. 37, s. 277. Am.

Electric
railway
crossings.

The only change is the insertion of the word "main" before the word "lines" in the second line.

Stoppage of
trains at
rail level
crossings.

Where safety
devices are
installed,
Board may
otherwise
order.

307. Every engine, train or electric car shall, before it passes over any such crossing as in the last preceding section mentioned, be brought to a full stop: Provided that whenever there is in use, at any such crossing, an interlocking switch and signal system, or other device which, in the opinion of the Board, renders it safe to permit engines and trains or electric cars to pass over such crossing without being brought to a stop, the Board may, by order, permit such engines and trains and cars to pass over such crossing without stopping, under such regulations as to speed and other matters as the Board deems proper. R.S., c. 37, s. 278.

The legislation has come down from 20 Vic., cap. 12, sec. 11, part 1, by which railways crossing one another at rail level were required to stop for three minutes before making the crossing. The stop was reduced to one minute by later legislation and so appeared in 51 Vic., cap. 29, sec. 258, and 56 Vic., cap. 27, sec. 2, but now, all that is required is that the train shall come to a full stop and shall not proceed except on signal and where interlocking devices have been installed it is not necessary to stop at all, if the signals are not against the train. Section 252, requires that no level crossing shall be made without permission of the Board, who may make such provisions for safety as it considers necessary. It is to be observed that not only must interlocking appliances be installed, but permission must also be granted by the Board, before trains may pass over a level crossing without stopping.

Failure to comply with the provisions of these sections confers a civil right of action upon any one injured thereby, and in a case where neither defendant's train or that of the other railway stopped the requisite length of time, and the plaintiff, a traveller on defendant's train, was injured in the collision which followed, he recovered damages from the defendants even though the other company had been still more at fault: **Graham v. Great Western Ry.**, 41 U.C.R. 324. Where a collision occurred at a level crossing and defendant's train had approached at too great a rate of speed to permit it to be stopped by hand brakes (the air brakes having failed to work), this was considered sufficient evidence of negligence to justify a verdict in favor of the plaintiff, and Ritchie, C.J., in his judgment, emphasizes the necessity of approaching such crossings with the greatest care: **Great Western Ry., v. Brown**, 3 S.C.R. 159.

The company appointing the signalman to take charge of the crossing is liable to a servant of the other company who is injured by the negligence of the signalman in operating the crossing. **Pattison v. C.P.R. and C.N.R.**, 14 C.R.C. 405, 5 D.L.R. 582, 26 O.L.R. 410.

See also **Wabash Ry. v. McKay**, 7 C.R.C. 466, where the engineer of a train on one railway, having stopped at the distant semaphore of the interlocking plant was held not to have been negligent in failing to stop his train again at a stop post about midway between the semaphore and the crossing.

By sec. 421 a penalty of one hundred dollars is imposed for a breach of this section.

Precautions at Highway Crossings and in Thickly Peopled Places.

308. (1) When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

Use of bell
and whistle.

(2) Where a municipal by-law of a city or town prohibits such sounding of the whistle or such ringing of the bell in respect of any such crossing or crossings within the limits of such city or town, such by-law shall, if approved by an order of the Board, to the extent of such prohibition relieve the company and its employees from the duty imposed by this section. R.S., c. 37, s. 274; 1917, c. 37, s. 6.

Exception.

The necessity of approval by the Board was introduced in 1917. Otherwise the section is simply R.S., c. 37, s. 274, somewhat re-arranged.

Section 301 requires every locomotive to be equipped with a bell weighing at least thirty pounds.

Signals at Common Law. The section now under consideration is the foundation for most of the actions for damages suffered from collision with trains at highway crossings, but a question arises whether the company must, apart from statute, furnish protection by signals

or otherwise at crossings which a jury should consider peculiarly dangerous. In other words there may be a liability at common law apart from any question of failure to give the statutory warnings. For instance, in **Hollinger v. C.P.R.**, 20 A.R. 244, the late Sir George Burton stated that though there was no duty on the part of the railway company to give the statutory warnings while shunting, they had no right to lay sidings across a highway, and that an accident having occurred on a siding where it crossed a street, the railway company was liable on the ground that there was an unauthorised use of the public highway. This was a dissenting judgment, and may not be a correct view of the law (see 21 Canadian Law Times at p. 477), but it illustrates the point that there may be a liability apart from statute. In **Lett v. St. Lawrence and Ottawa Ry.**, 1 O.R. 545, the jury found that the scene of the accident was an unusually dangerous crossing, and that in addition to a failure to give the statutory signals, there was not a man on the rear end of the car, which was moving reversely, and that there was not a sufficient signboard. A verdict was given for the plaintiffs. This verdict was objected to on the ground that other requirements than those prescribed by the statute were exacted, but the verdict was sustained. The case is also reported in 11 A.R. 1 and 11 S.C.R. 422, but the judgments there were directed to the question of damages only. The principle of the case was, however, relied on in **Henderson v. Canada Atlantic Ry.**, 25 A.R. 437 and 29 S.C.R. 632, and Sir Henry Strong, at p. 636 of the report, says: "Further, I think it right to say that on this evidence (that the bell did not ring, that the speed was over six miles an hour, and that a flagman stationed there did not give warning) we should be justified in holding that there was common law negligence, as in the case of **St. Lawrence & Ottawa Ry. v. Lett**," in 11 S.C.R. 422, and Gwynne, J., in his judgment on the same page, says: "I am of opinion that if the ringing of the bell would prevent an accident to a person crossing the highway there is an obligation at **common law** to ring it."

It was also decided in the **Henderson** case that the statutory warnings apply as well to shunting operations and other temporary movements of traffic, as to a train running on the main line. In a case where shunting was being done in a town, where the jury found that the railway company was guilty of negligence, and that a man should have been stationed on the highway to warn the public, a verdict for the plaintiff was upheld: **Lake Erie and Detroit Ry. Co. v. Barclay**, 30 S.C.R. 360. The same

rule has been adopted in the United States: **Pennsylvania Ry. v. Miller**, 99 Federal Reporter 529, but there is judicial authority to the contrary in England: See **Stubbley v. London, etc., Ry.**, L.R. 1 Ex. 13, and Mr. Justice Patterson in **C.P.R. v. Fleming**, 22 S.C.R. 44, quotes this case with approval and says: "The Legislature having prescribed the precaution to be taken at level crossings, we have no right to hold those precautions insufficient and to throw it open to the jury on every trial to find **ex post facto** that something more ought to have been done in the case that for the moment excites their sympathy." This remark appears in a dissenting judgment, and differs from the later **Henderson** and **Barclay Cases**, and the effect of the **Stubbley** and similar English cases may perhaps be weakened by **Smith v. South Eastern Ry.** (1896), 1 Q.B. 178. Again, in **Gray v. Wabash**, 28 D.L.R. 244, 20 C.R.C. 391, 35 O.L.R. 510, it was held that failure to whistle within 550 ft., though not required by statute, might well be found by a jury to be negligence. The case of **Girouard v. C.P.R.**, reported 1 C.R.C. 343, lays down the rule in Quebec that where there is a large amount of traffic at a crossing, additional precautions must be taken to protect the public, and in **Bonneville v. G.T.R.**, 1 O.W.R. 304, and **Moyer v. G.T.R.**, 3 C.R.C. 1, the same principle is again enunciated for Ontario. Where a siding extending across a highway is particularly dangerous, and shunting is being done upon it, a Divisional Court held that, apart from statute, there is a duty cast upon railways to take reasonable precautions at dangerous points, to avoid accident: **Smith v. St. Catharines, etc., Ry. Co.**, 4 C.R.C. 220. Some remarks of the judges of the Supreme Court in **G.T.R. v. McKay**, 3 C.R.C. 52, when dealing with a later section (sec. 309), seem to point, however, to a different conclusion. The subject is dealt with in the notes to that section. See also **Gowland v. H.G. & B. Ry.**, 24 D.L.R. 49, 19 C.R.C. 214, and note on that case, 19 C.R.C. 221.

When Signals Required. All persons rightfully upon the railway track as well as upon the highway crossing next to the coming train, are entitled to the benefit of the provisions of section 308. These statutory warnings are not required where there is a mere way and not a public highway: **Bennett v. G.T.R.**, 3 O.R. 446; **Anderson v. G.T.R.**, 27 O.R. 441, 24 A.R. 672, 28 S.C.R. 541, and the word "highway" used in this section was defined, in **Royle v. C.N.R.**, 3 C.R.C. 4, to be a public highway which is so as of right; and there is no statutory duty to give the signals for a mere trail, though if persons using it

cross the railway tracks with the consent, express or implied, of the railway, it is probably the latter's duty at common law to give such signals as will be necessary for their protection; and again, where a little-used siding crossed a narrow arched-in alley-way, it was held incumbent on the company to give some warning: **Smith v. Niagara, etc., Ry. Co., supra.** But the statute does not apply to a roadway forbidden to, though used by, the public: **DeVries v. C.P.R.,** 27 D.L.R. 20, 20 C.R.C. 375, 26 Man. L.R. 156, nor to a street marked out on a plan and registered, but fenced in with other land and used for pasture: **Shoebrink v. Canada Atlantic Ry.,** 16 O.R. 515. Similarly there is no duty to give the statutory signals or to take special precautions in approaching or passing a siding: **Van Wart v. New Brunswick Ry.,** 27 N.B.R. 59, 17 S.C.R. 35, nor in shunting in a city yard where the engine is never more than 100 yards from the crossing: **G.T.R. v. McAlpine,** 13 D.L.R. 618, 16 C.R.C. 186, (1913) A.C. 838, and where the fact that the signals were not given did not contribute to the accident, there can be no recovery, as in the **Shoebrink Case**, where a boy was sitting on a fence adjoining a railway and at a highway, and slipped off and was caught in a passing train, owing to a fright caused by the train giving a sudden jerk when passing him; see also the **McAlpine Case** above.

But where an electric car approached a private driveway across the railway at twenty miles an hour, not in a thickly-peopled portion of a city, town or village, the company was held guilty of negligence at common law: **Gowland v. Hamilton, etc., Ry.,** 24 D.L.R. 49, 19 C.R.C. 214. See also notes 19 C.R.C. 221.

And see also **Hanna v. C.P.R.,** 7 C.R.C. 392, where it appeared that the injured person had seen the train approaching and attempted to cross the track in front of it.

The right to recover, however, is not limited to cases of actual collision, and where a horse was frightened and ran away, owing to the approach of a train which had not whistled, the occupants of the rig were entitled to recover: **Rosenberger v. G.T.R.,** 32 U.C.C.P. 349, 8 A.R. 482, 9 S.C.R. 311; and see **Robertson v. Halifax Coal Co.,** 20 N.S.R. 517, and **Sibbald v. G.T.R.,** 19 O.R. 164, 18 A.R. 184, 20 S.C.R. 259; **Victorian Railway Commissioners v. Coultas,** 13 A.C. 222. The mere fact that an automatic bell is on the engine and that it was in good order when leaving the last station is not sufficient to satisfy the statute when there is positive evidence that it was

not ringing on approaching the crossing where the accident occurred: **Wilton v. Northern Ry. Co.**, 5 O.R. 490.

Evidence that witnesses did not hear the signals given is not sufficient unless accompanied by a statement that they could have heard them if given: **Ellis v. Great Western Ry. Co.**, L.R. 9 C.P. 551.

An action for damages caused through the failure to give signals is damage done by reason of the railway, and must be brought within two years from its occurrence under section 391, *infra*: **Browne v. Brockville and Ottawa Ry. Co.**, 20 U.C.R. 202.

Where there is evidence that the statutory signals were not given, but no evidence of the conduct of deceased just before the accident, the railway company is liable if it fails to prove affirmatively that the deceased was guilty of contributory negligence: **Johnson v. G.T.R.**, 25 O.R. 64, 21 A.R. 408; but where contributory negligence is proved the plaintiff cannot recover, even though no signals were given: **Winckler v. Great Western Ry.**, 18 U.C.C.P. 250; **Boggs v. Great Western Ry.**, 23 U.C. C.P. 573, and this last case decides that where plaintiff's son was driving, and the contributory negligence was that of the driver, the plaintiff cannot recover, and it is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and if he does not look when he could have seen along the track for some distance if he did, he cannot succeed: **Johnston v. Northern Ry. Co.**, 34 U.C.R. 432; **Weir v. C.P.R.**, 16 A.R. 100. The **Boggs Case** would probably now be decided differently since the decision in **The Bernina, Mills v. Armstrong**, 13 A.C. 1, overruling **Thoroughgood v. Bryan**, 8 C.B. 115.

In **Moir v. C.P.R.**, 7 C.R.C. 380, the defendants were held not liable despite a finding by the jury that the signals were not given, where it appeared that the boy who was killed was running down the hill upon the highway and being unable to stop, had run into the last car on the train; but where a child of fourteen, while coasting, was struck not by a train but by a hand-car, it was held that a jury was at liberty to find that some warning should have been given, apart altogether from the Railway Act: **Burtch v. C.P.R.**, 6 C.R.C. 461, 13 O.L.R. 632.

Where the train crew swore the whistle had been blown but did not claim the bell had been rung, and where there was evidence that the headlight might have

been obscured by escaping steam, the company was held liable: **Pedlar v. C.N.R.**, 20 Man. L.R. 265, 15 W.L.R. 613; but compare **Zuvelt v. C.P.R.**, 12 C.R.C. 420, 23 O.L.R. 602.

The Pennsylvania rule of "stop, look and listen" at a highway is not in force in Ontario, and the question of contributory negligence is one depending upon the facts in each case: **Hollinger v. C.P.R.**, 21 O.R. 705, affirmed 20 A.R. 244; **Mackenzie v. B.C. Electric Ry. Co.**, 15 D.L.R. 530, 16 C.R.C. 337; **Doyle v. C.N.R.**, 46 D.L.R. 135, 24 C.R.C. 319.

Thus, where the plaintiff approached so close to the track as to be unable to control a restive horse, whereas by stopping and listening some way off, he might have avoided the accident, the company was held liable, inasmuch as it had failed to give the statutory warnings, the plaintiff having a right to assume these would be given: **Vallee v. G.T.R.**, 1 O.L.R. 224, 1 C.R.C. 338,

For cases of pure conjecture as to the cause, see **Pere Marquette Ry. v. Crouch**, 13 C.R.C. 247, and **G.T.R. v. Griffith**, 13 C.R.C. 302, 45 S.C.R. 380.

For cases of contributory negligence in connection with highway crossing accidents and the giving of signals, see: **Morrison v. Dominion Iron, etc., Co.**, 45 N.S.R. 466; **Fewings v. G.T.R.**, 1 O.W.N. 1.

In **Wabash R.R. Co. v. Misener**, 6 C.R.C. 70 and **G.T.R. v. Sims**, 8 C.R.C. 61, the rule is laid down that persons passing or attempting to pass over a level railway crossing must act as reasonable and sentient beings, and unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. But all the circumstances are to be considered in determining whether or not the plaintiff has been guilty of contributory negligence; **Champagne v. G.T.R.**, 4 C.R.C. 207; **Ramsay v. Toronto Ry. Co.**, 17 D.L.R. 220, 17 C.R.C. 6, 30 O.L.R. 127.

In **Blake v. C.P.R.**, 17 O.R. 177, Galt, C.J., held that the plaintiff not having looked for a train while crossing, he could not recover, while Rose J., differed from him, and MacMahon J., expressed no opinion on this point. **Weir v. C.P.R.**, *supra*, was discussed and explained by Rose, J., in his judgment in this case. Even though cars are in the way and obstruct the view, the person injured may be guilty of contributory negligence: **Filiatrault v. C.P.R.**, Q.R. 18 S.C. 491. As stated by Os-

ler, J.A., in **Vallee v. G.T.R.**, 1 C.R.C. 338, "where the facts or the proper inferences from the facts are in dispute, the question of contributory negligence is for the jury." See also: **Miller v. G.T.R.**, 25 U.C.C.P. 389; **Wilton v. Northern Ry.**, 5 O.R. 490; **Peart v. G.T. Ry.**, 10 O.L.R. 753; **Beckett v. G.T.R.**, 13 A.R. 174, 16 S.C.R. 713; **Andreas v. C.P.R.**, 2 W.L.R. 249, 37 S.C.R. 1, 5 C.R.C. 440, 450.

The general subject of contributory negligence is discussed in the notes preceding section 298.

309. No train shall pass at a speed greater than ten miles an hour,—

Speed of trains.

(a) in or through any thickly peopled portion of any city, town or village, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission is given by some regulation or order of the Board; or,

In unfenced portions of thickly peopled places.

(b) over any highway crossing at rail level in any thickly peopled portion of any city, town or village, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board, in force with respect to such crossing, or unless permission is given by some regulation or order of the Board; or,

Over unprotected highway crossings in thickly peopled places.

(c) over any highway crossing at rail level, if at such crossing, subsequent to the first day of January, one thousand nine hundred and five, a person or vehicle using such crossing, or an animal being ridden or driven over the same, has been struck by a moving train, and bodily injury or death thereby caused to such person or to any other person using such crossing, unless and until such crossing is protected to the satisfaction of the Board; or,

Over Crossings where accidents happened.

(d) over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the

Over crossings not protected as ordered.

safety and convenience of the public and which order has not been complied with. R.S., c. 37, s. 275, **part**; 1909, c. 32, s. 13, **part**; 1910, c. 50, s. 15. Am.

This is substantially R.S.C. cap. 37, sec. 275, somewhat rearranged.

Under the sub-section of the Act of 1906 corresponding to sub-sec. (c) doubt sometimes arose as to what accidents were meant: **Bell v. G.T.R.**, 29 O.L.R. 247, 48 Can. S.C.R. 561, 16 C.R.C. 318, 324.

All doubt is now removed by sub-section (c).

"Village" in Ontario, includes what is known as "a police village" that is an unincorporated village, organized for certain limited purposes under the Municipal Act: **Zuvelt v. C.P.R.**, Ont. App. 12 C.R.C. 420, 23 O.L.R. 602, followed in **Minor v. G.T.R.**, 22 C.R.C. 194, 35 D.L.R. 106.

Sub-sections (b), (c), (d) which were enacted by 8-9 Edw. VII., c. 32, effected, as will be readily seen, an important change in the law, limiting, as they do, the rate of speed over highway crossings in a thickly peopled portion of a city, town or village, to ten miles an hour, unless the crossing is protected or unless permission is given by the Board. In the case of any crossing at which an accident has happened since 1st January, 1905, causing bodily injury, the alternative of obtaining the permission of the Board is not expressly given, and it is to be noted that this sub-section is not confined in its application to crossings in cities, towns and villages.

The onus of showing that any case comes within one of the exceptions is, naturally, on the company: **Bell v. G.T.R.**, 15 D.L.R. 874, 16 C.R.C. 318, 324, 48 S.C.R. 561: **Critchley v. C.N.R.**, 34 D.L.R. 245, 21 C.R.C. 277.

Under the section in the Act of 1888 corresponding to sub-section 1 of this section there was much discussion as to whether, (1) Railways were required to erect gates or fences across highways in the thickly peopled parts of cities, towns or villages and (2) Whether a jury might find that, even though statutory requirements had been fulfilled, the dangerous character of the crossing required additional precautions. In **G.T.R. v. McKay**, 3 C.R.C. 52, it was held, reversing the Court of Appeal for Ontario, that gates need not be erected and that it was for the Railway Committee and not for a jury to prescribe other

precautions than those provided expressly by the statute. The subject was elaborately reviewed by the Superior Court of Quebec, in **Tanguay v. G.T.R.**, 3 C.R.C. 13, although no definite decision on the point was reached and it has also been dealt with in the notes to these cases in 3 C.R.C. 59, where a history of the legislation on this subject appears. See also the note at page 221 of 19 C.R.C. to **Gowland v. H. G. & B. Ry.**, a case of accident at a private crossing, in which the **McKay Case** was discussed and distinguished. See also **Girard v. Quebec, etc., Ry.**, Q.R. 25 S.C. 245, Q.R. 15 K.B. 48. In **Tabb v. G.T.R.**, 4 C.R.C. 1, 8 O.L.R. 203, and **Potvin v. C.P.R.**, 4 C.R.C. 8, where infants had got upon the track owing to a failure to fence, the Courts decided that there had been a clear breach of this provision, and a verdict against the defendants was upheld. Where it is not proved that the accident happened in a "thickly peopled" part of the town, and no order of the Railway Committee is produced requiring the erection of gates, a railway company is not liable for an accident happening when its train is travelling at the normal rate of twelve miles an hour: **Filiatrault v. C.P.R.**, Q.R. 18 S.C. 491; **G.T.R. v. Beckett**, 13 A.R. 174, 16 S.C. R. 713; see also **Critchley v. C.N.R.**, 34 D.L.R. 245, 21 C.R.C. 277, **Minor v. G.T.R.**, 35 D.L.R. 106, 22 C.R.C. 194, 38 O.L.R. 646.

Too great a rate of speed may be a ground of negligence: **Connell v. The Queen**, 5 Ex. C.R. 74, but it must be borne in mind that railway trains are intended to run fast, and "no rate of speed at which a railway train is run is negligence *per se*, in the absence of a statute regulating the rate of speed": **Wasson v. McCook**, 80 Mo. A.R. 483 at page 489; **Quebec, etc., Ry. v. Girard**, 15 Que., K.B. 48. See **G.T.R. v. Hainer**, 36 S.C.R., per Nesbitt, J., at p. 199; and the mere fact that a train exceeds the time-table rate of speed is not in itself evidence of negligence: **Colpitts v. The Queen**, 6 Ex. C.R. 254; nor the fact that a train is running behind its schedule time: **Hanley v. Michigan Central Ry.**, 6 C.R.C. 240, 13 O.L.R. 560.

The exception made when the right of way is fenced cannot be invoked if the fences have gaps without protection opposite intersecting streets: **Jolicoeur v. G.T.R.**, Q.R. 34, S.C. 457. The adequacy or otherwise of the protection at any crossing is a matter for the Railway Board, not for a jury: **McKay v. G.T.R.**, 34 S.C.R. 81; **Andreas v. C.P.R.**, 7 Terr. L.R. 327.

See notes on section 256.

Trains or
cars moving
reversely.

310. (1) Whenever in any city, town or village any train not headed by an engine is passing over or along a highway at rail level, which is not adequately protected by gates or otherwise, the company shall station on that part of the train, which is then foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway. 1917, c. 37, s. 7.

Board
may exempt.

(2) The Board, upon the application of any company or person, shall have power to order that this section shall not apply to any particular trains or classes of trains, or to trains running on any specified portions of the railway of the company: Provided that no such order shall be made with respect to trains engaged in shunting or switching, or in yard or terminal movements. 1910, c. 50, s. 7.

Proviso.

With a slight rearrangement of the wording sub-section 1 is the same as section 228 of the Act of 1903. The words "or of the tender if that is in front" after "train" in the 5th line have been omitted. The words "over or along a highway at rail level" were first introduced in that Act. In the Act of 1888 and amending Act 55-56 Vic., cap. 27, sec. 9, the section read "whenever any train of cars is moving reversely in any city, town or village." Before this change the section applied even to shunting operations whether or not there was any highway to be crossed, and as well for the protection of employees in railway yards as of the public. See **Bennett v. G.T.R.**, 3 O.R. 446, **C.P.R. v. Boisseau**, 2 C.R.C. 335; **McMullin v. Nova Scotia Steel and Coal Co.**, 7 C.R.C. 198, 39 S.C.R. 593. But as now framed the section seems intended to cover only cases where a train is moving over or along a highway at rail level: **Burley v. G.T.R.**, 10 O.W.R. 857; though the duty imposed by it is still owed to an employee injured by a train crossing a highway: **Lamond v. G.T.R.**, 7 C.R.C. 401, 16 O.L.R. 365.

The expression "train" was in the earlier Act "train of cars" and this was held to include an engine and tender: **Hollinger v. C.P.R.**, 21 O.R. 705, 20 A.R. 244, and now by section 2, sub-section 34, a train includes "any engine, or locomotive or other rolling stock." Thus a number of cars which are connected and which are forced backward by the concussion incident to coupling, preparatory to getting under way in a forward direction will constitute a train: **Helson v. Morrissey, etc., Ry.**, 1 D.L.R. 33, 19 W.L.R. 835, 17 B.C.R. 65.

A breach of this section confers a right of action upon any one injured thereby: **Hollinger v. C.P.R.**, *supra*, but a breach of the section does not excuse plaintiff's contributory negligence: **Casey v. C.P.R.**, 15 O.R. 574, and where a train was backing down without a lookout man in a yard, and deceased sprang upon the track to save a woman who did not see it approaching, his representatives could not recover because, though his action was praiseworthy, death was due to his own act: **Anderson v. Northern R.W. Co.**, 25 U.C.C.P. 301. Thus it is not enough to show that a company is in breach of this statutory duty; it must also be shown that such breach and not the folly or recklessness of the injured person was the cause of the accident: **G.T.R. v. McAlpine**, 13 D.L.R. 618, 16 C.R.C. 186, (1913) A.C. 838; following **Dublin, Wicklow & Wexford Ry. v. Slattery**, 3 A.C. 1155, 1166, and **Davey v. London & South Western Ry. Co.**, 12 Q.B. D. 70.

This section is not complied with by having a man on the wrong end of the last car where he cannot see persons approaching: **Levoy v. Midland Ry. Co.**, 3 O.R. 623; nor is it complied with by having on rear-end a brakeman who is unacquainted with conditions: **Mitchell v. G.T.R.**, 22 D.L.R. 804; and even if the man is posted as required by the Act, it is open to the jury to find that he did not do what a reasonable man would have done: **O'Callaghan v. Gt. Northern Ry. Co.**, 20 D.L.R. 145, 18 C.R.C. 156; and additional precautions may be required when cars are being shunted in a dangerous place: **Lett v. St. Lawrence Ry. Co.**, 1 O.R. 545; **Lake Erie, etc., Ry. Co. v. Barclay**, 30 S.C.R. 360.

The word "highway" is liberally interpreted. Thus the section has been held to apply in a case of a crossing which, though not a regular one, was in general use without objection by the company. **G.T.R. v. McSween**, 2 D.L.R. 874.

Again, a breach of the spirit, though not of the letter, of the section was held to make a company liable for an accident which might have been avoided but for such breach: **G.T.R. v. Daoust**, 14 Que. K.B. 548, where a locomotive was being used rear end foremost. Another unusual case is that of **Garside v. G.T.R.**, 23 D.L.R. 463, 18 C.R.C. 272, where the company was held liable for a breach of this section and of section 308 even though the crossing was protected by a gate, such gate not having been authorised or required by the Board.

Respecting the Obstruction of Highway Traffic.

Train must
not obstruct
highway
more than
five minutes.

311. Whenever any railway crosses any highway at rail level, the company shall not, nor shall its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time, or, in shunting, to obstruct public traffic for a longer period than five minutes at one time, or, in the opinion of the Board, unnecessarily interfere therewith. R.S., c. 37, s. 279.

The concluding words, "or in the opinion of the Board, unnecessarily interfere therewith" were added by 6 Edw. VII., cap. 42, s. 21, to section 229 of the Act of 1903. A penalty for violation of this section is imposed by section 422, but if the offence is, in the opinion of the court, excusable, the prosecution may be dismissed.

It should be noted that what is forbidden is "wilfully" permitting, and where there were gates and it was not shewn that the delay was not attributable to the gate-man rather than to the trainmen, a conviction was quashed: *Rex. v. G.T.R.*, 18 D.L.R. 323, 18 C.R.C. 74.

It is a breach of the section to allow cars to stand "on any part of the highway" for more than five minutes, even though a thoroughfare is left: *Campbell v. C.N.R.*, 12 D.L.R. 272, 15 C.R.C. 357, 23 Man. R. 385; see also: *Weaver v. C.N.R.*, 13 C.R.C. 468, 4 Sask. L.R. 201, in which a horse was frightened by a caboose left on the highway.

Traffic, Tolls and Tariffs.

Accommodation for Traffic.

Accommoda-
tion.

312. (1) The company shall, according to its powers,—

At all
stations.

(a) furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway;

Carriage and
delivery.

(b) furnish adequate and suitable accommodation for the carrying, unloading and delivering of all such traffic;

- (c) without delay, and with due care and diligence, receive, carry and deliver all such traffic; and, No delay.
- (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering such traffic; Appliances.
- (e) furnish such other service incidental to transportation as is customary or usual in connection with the business of a railway company, as may be ordered by the Board. Other service.

(2) Such adequate and suitable accommodation shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by the company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways, together with the placing of cars and moving them upon and from such private sidings and private branch railways. What adequate and suitable accommodation shall include.

(3) If in any case such accommodation is not, in the opinion of the Board, furnished by the company, the Board may order the company to furnish the same within such time or during such period as the Board deems expedient, having regard to all proper interests; or may prohibit or limit the use, either generally or upon any specified railway or part thereof, of any engines, locomotives, cars, rolling stock, apparatus, machinery, or devices, or any class or kind thereof, not equipped as required by this Act, or by any orders or regulations of the Board made within its jurisdiction under the provisions of this Act. May be ordered by Board.

(4) Such traffic shall be taken, carried to and from, and delivered at the places aforesaid on the due payment of the toll lawfully payable therefor. Payment of tolls.

(5) Where a company's railway crosses or joins or approaches, in the opinion of the Board, sufficiently near to any other railway, upon which passengers or mails are transported, whether the last mentioned railway is within the legislative authority of the Parliament of Canada or not, the Board may order the company to so regulate the Board may regulate time so as to allow connections to be made between railways for passengers and mails.

running of its trains carrying passengers or mails, and the places and times of stopping them, as to afford reasonable opportunity for the transfer of passengers and mails between its railway and such other railway, and may order the company to furnish reasonable facilities and accommodation for such purpose.

Board may
order specific
works, tolls,
etc.

(6) For the purposes of this section the Board may order that specific works be constructed or carried out, or that property be acquired, or that specified tolls be charged, or that cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Board, or that any specified steps, systems, or methods be taken or followed by any particular company or companies, or by railway companies generally.

Right of
action on
default.

(7) Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.

Condition
against
negligence
invalid.

Demurrage.

(8) The Board may make regulations, applying generally or to any particular railway or any portion thereof, or may make an order in any case where it sees fit, imposing charges for default, or delay by any company in furnishing accommodation, appliances, or means as aforesaid, or in receiving, loading, carrying, unloading or delivering traffic, and may enforce payment of such charges by companies to any person injuriously affected by such default or delay; and any amount so received by any person shall be deducted from the damages recoverable or recovered by such person for such default or delay; and the Board may, by order or regulation, determine what circumstances shall exempt any company from payment of any such charges. R.S., c. 37, s. 284. 1908, c. 61, s. 10. Am.

Former sec. 284 amended. Sub-sec. (e) clause 1 is new, also in sub-sec. 8 line two after "thereof" the words "or may make—it sees fit" are added to make it clear that the Board may deal with specific cases.

In a number of cases the Board has exercised its jurisdiction under this section and prescribed the nature and extent of the facilities which railway companies may be required to furnish on the railway. The following is a summary of these decisions and of similar decisions by the United States Interstate Commerce Commission:

Supplying cars for moving grain from Western provinces under sec. 318, see **Re Goose Lake District Case**, 21 C.R.C. 38.

The Board has jurisdiction to order oil tank cars to be supplied: **Empire Refining Co. v. Pere Marquette Ry. Co.**, 10 C.R.C. 158. A general order to supply box cars was refused in **Brown v. C.P.R. and C.N.R.**, 11 *ibid.* 152. In **Iron Mountain v. Great Northern Ry. Co.**, 15 *ibid.* 311, box cars were required to be furnished to carry ore instead of open dump cars and not held exclusively for Canadian traffic. In times of car shortage a railway should retain its cars to care for traffic on its own line. It is entitled to the long haul of its own line where reasonable. **Imperial Steel & Wire Co. v. G.T.R.**, 11 *ibid.* 395; **Jacobs Asbestos Co. v. Quebec Central Ry. Co.**, 19 *ibid.* 357. A carrier cannot reserve to itself the long haul, if to do so works unduly to the detriment of the shippers. **Paducah Board of Trade v. Illinois Central Ry. Co.**, 29 I. C.C. 583. Every railway should furnish accommodation for traffic on its own line either by interchanging cars or transshipping goods: **C.P.R. v. Nelson & Fort Sheppard Ry. Co.**, 11 C.R.C. 400. In **Missouri & Illinois Coal Co. v. I.C. Ry. Co.**, 22 I.C.C. 39, it was held that carriers must keep their through routes open and in operation and furnish the necessary facilities for transportation, and the established through routes must be served without respect to the fact that in rendering the service the carriers' cars may be carried beyond their own lines.

The duty of the initial carrier to furnish equipment for a shipment which moves on to other lines is universally recognized, and in cases where that is impracticable or deemed unwise the carriers assume to bear the burden of the transfer from the equipment of one line to that of the other; in contemplation of the law there is no such thing as local traffic which enjoys rights superior to through traffic.

It will be noted that this case dealt more especially with the obligation of the carrier to supply the lawful facilities and transportation in connection with established through routes and joint rates.

There is no right inherent with the shipper to demand that any transfer resulting from the reconsignment at his request of freight originally consigned and billed to a given destination, shall be performed by the carrier, either at its own expense or otherwise; nor is there any provision of law under which a carrier may be compelled to possess itself of special equipment in such amount that a considerable portion of it would remain idle for six months in the year. **Chicago & N.W. Ry. Reconsignment Rules**, 29 I.C.C. 620. See also **St. Louis S.W. Ry. Co. v. United States**, 245 U.S. 136 at p. 144. This would appear to be the case under our Act, subject to the special provisions of sec. 318 for moving grain from the Western provinces.

Supplying Cars.

The Board prescribed rules for supplying cars for moving coal in **Re Coal Transportation Facilities**, 22 C.R.C. 338. See **Mancell v. M.C.R. Co.**, 19 C.R.C. 246 (special horse car) and sections 316 and 318. The Board has no jurisdiction to compel a railway company to furnish a foreign car: **Hunting Merritt Co. v. C.P.R.**, 20 C.R.C. 181.

Equipping Cars.

Under this section suitable equipment has been held to include furnishing cross pieces in tops of cars used to carry meat. **Vancouver-Prince Rupert Meat Co. v. Great Northern Ry. Co.**, 13 C.R.C. 15. The Board has no jurisdiction to order the railway company to pay expenses incurred in fitting up cars with such appliances as suitable accommodation. An order to supply box cars with heaters was refused in **Canadian Piano & Organ Co. v. Canadian Freight Association**, 12 C.R.C. 22 and **Okanagan Valley Growers v. Canadian Freight Association**, 24 C.R.C. 55.

The Board has jurisdiction to deal with the equipment of flat cars by stakes and fastenings: **Canadian Manufacturers Association v. Canadian Freight Association**, 13 C.R.C. 3. It refused to order special doors for box cars used to carry sand and gravel as in case of grain. **McKenzie v. C.P.R. and C.N.R.**, 23 C.R.C. 99, it will not order special equipment of cars as an experiment: **Potato Shippers v. C.P.R.**, 24 C.R.C. 46.

Train Service.

An additional train for handling milk traffic will not

be ordered unless its refusal involves unjust discrimination: **Harris v. C.P.R.**, 21 C.R.C. 31. Passenger train service will not be ordered on a milk train, **Massena Springs v. G.T.R.**, 21 C.R.C. 34. Unremunerative train service will not be ordered, **City of Hamilton v. G.T.R.**, 21 C.R.C. 211, or if ordered, it will be discontinued after a thorough trial. **Jordan v. Canadian Express Co.**, 23 C.R.C. 55, and where the cost of operating between two points is much higher than the earnings, a minimum service will be given, **New Westminster Board of Trade v. Great Northern Ry. Co.**, 23 C.R.C. 58; railway companies must give such minimum service even with decreasing traffic receipts, as will enable the ordinary business of the country to be transacted. **Lethbridge Board of Trade v. C.P.R.**, 24 C.R.C. 24. Such service should be furnished as the traffic requires, but it should not be treated as a special train movement and a guaranteed number of cars demanded. **Oyler v. Dominion Atlantic Ry. Co.**, 20 C.R.C. 238.

In the following cases the Board has dealt with applications for increased service, which were granted in **New Westminster Board of Trade v. Great Northern Ry. Co.**, 11 *ibid.* 324; **Re Trenton etc. Line**, 19 *ibid.* 268, **Loughboro v. C.N.R.**, 19 *ibid.* 276 (unless bonus of \$5,000 repaid), **La Salle v. C.P.R.**, 20 *ibid.* 190; **East Greenfield v. Montreal, etc.**, and **New York Central Ry. Cos.**, 21 *ibid.* 208, **Oakville v. G.T.R. and C.P.R.**, 22 *ibid.* 433, reversed, 24 *ibid.* 375; and refused in **Massiah v. C.P.R.**, 18 *ibid.* 358, **Picton Board of Trade v. C.N.O.R.**, *ibid.* 363, **Wood v. C.P.R.**, *ibid.* p. 365, **Cole v. C.P.R.**, 22 *ibid.* 429. In **Burlington Beach Commission v. Hamilton Electric Radial Ry. Co.**, 24 *ibid.* 39, a service at a loss was held obligatory by virtue of municipal by-laws and agreements confirmed by Dominion Statute. In the United States, a common carrier cannot, under the fourteenth amendment, be compelled to continue operation at a loss. **Brooks Scanlon Co. v. R.R. Comn. of La.**, 251 U. S., 396 at p. 399. As to enforcing agreements for train service see **Tobique Valley Ry. Co. v. C.P.R.**, 1 C.R.C. 282, 2 M.B. Eq. 195; **North Queens Board of Trade v. Halifax & South Western Ry. Co.**, 20 C.R.C. 187.

Stations or Stopping Places on the Railway.

The Board will not permit a railway company to change the stopping places on its line when by the Act incorporating its predecessor in title, the municipal by-laws granting the franchise and designating such stopping places were continued in force. **Re London & Lake Erie Transportation Co.**, 15 C.R.C. 92, 10 D.L.R. 211.

Siding Facilities.

The Board can order the restoration of spur track facilities: **C.N.R. v. Robinson**, 6 C.R.C. 101, 37 Can. S.C. R. 541. And damages may be recovered for improper deprivation thereof—the Board's decision as to refusal of "reasonable facilities" is conclusive, 11 C.R.C. 289, 304, 43 S.C.R. 387, (1911) A.C. 739, 13 C.R.C. 412. Tracks on the right of way serving industries should not be removed without leave of the Board. **Re Great Northern Ry. Co. Sidings**, 23 *ibid.* 5. Siding facilities may be ordered for a different industrial site than proposed by the railway company but at no greater expense. **Wolfville Fruit Co. v. Dominion Atlantic Ry. Co.**, 24 *ibid.* 11.

Railway companies should not make agreements to construct private sidings on the right of way, as unjust discrimination may thereby result. **C.P.R. v. Vancouver Ice Co.**, 23 *ibid.* 1. Private sidings not on the right of way are not part of the railway. A stranger cannot compel the siding to be connected and oblige the company to place cars upon it for handling traffic at other points on its line than starting points, junction points and established stopping places. **Kammerer v. C.P.R.**, 21 C.R.C. 74.

Subject to the jurisdiction of the Board under this section and after the route map has been approved, the company may locate its tracks upon its right of way except across highways where the approval of the Board is required. **C.P.R. v. Vancouver Ice Co.**, *supra*. **Re Great Northern Ry. Co.**, 23 C.R.C. 5. An industrial siding crossing a highway should only be removed by direction of the Board and not upon notice given by the municipality controlling the highway. **Shragge v. City of Winnipeg**, 24 *ibid.* 61, **G.T.R. v. Cobourg**, 24 *ibid.* 58. The Board has no jurisdiction to order resumption of a railway service discontinued ten years before the Board was constituted. **Chamber of Commerce v. S.E. Ry. Co.**, 14 C.R.C. 367. Nor can it order stop-over privileges except to prevent discrimination: **Simcoe Fruits v. G.T.R., & C. P.R.**, 14 C.R.C. 370.

The Board has no jurisdiction to compel a railway company to maintain a dock at a Lake Terminus (Michipicoten Harbour) and provide facilities thereat: **Dominion Transportation Co. v. Algoma, etc., Ry. Co.**, 17 C.R.C. 422, 20 D.L.R. 886.

A business of fifteen thousand dollars per annum is the minimum to justify Board in making a flag station

an agency point, though carriers may venture to do so with less revenue, in which case the Board may determine what accommodation may reasonably be expected. **Oakdale Grain Growers v. G.T.P.R. Co.**, 20 C.R.C. 70: **Re Lower Argyle Station**, 21 C.R.C. 434.

The Board will not order railway companies to put in sidings or other accommodation at every three or four miles along their lines to offset existing highway disadvantages: **Pheasant Farmers v. C.P.R.**, 14 C.R.C. 13; 7 D.L.R. 887; **McPherson v. C.P.R.**, 18 C.R.C. 57; **New Minas Fruit Co. v. Dominion Atlantic Ry. Co.**, 24 *ibid.* 97; **Kelly v. G.T.R.**, 24 *ibid.* 367. See sections 185-7, Industrial Spurs.

Station Accommodation.

The failure of a railway company to provide a suitable station house at a regular stopping place as required by former section 284 (1906) now section 312, renders it liable for the resultant illness occasioned to a passenger from exposure to the elements while waiting at night for a train. **Morrison v. Pere Marquette Ry. Co.**, 12 D. L.R. 344, 15 C.R.C. 406, 27 O.L.R. 551, 28 *ibid.* 319.

In the **Flag Station Case**, **Winnipeg Jobbers' and Shippers' Association v. Railway Companies**, 8 Can. Ry. Cas. 151; **Thrift v. New Westminster, Southern & Great Northern R.W. Cos.**, 9 Can. Ry. Cas. 205, the Board held it had jurisdiction to require a company to erect and maintain platforms or any other structures or works that may be deemed reasonably necessary for the protection of property or the public at flag stations and to order suitable accommodation to be provided and permanent agents to be employed where the earnings amount to \$15,000.00 per annum. Followed in **Rutter Stn. Case**, 14 C.R.C. 1, 8 D.L.R. 711.

On 15th December, 1909, the Board made an order upon a complaint by the residents of the Township of Montcalm directing the Canadian Northern Quebec Ry. Co. by a specified date to ballast its Montfort Branch, provide suitable ditches on the right of way, replace the rail then in use with a heavier rail, provide a platform and shelter for passengers at Chapleau Station, supply the regular passenger trains with baggage cars, put its passenger coaches in fit condition for passenger traffic and appoint and maintain a permanent agent at Montfort. Besides the penalties provided in the Act a penalty of \$50 was imposed for each day's violation of any provision of the order.

The Board allowed the agents at five stations to be dispensed with and refused the application at six others. **Re Quebec, etc., Ry. Co.**, 24 C.R.C. 229.

Where business in a locality of a station is built upon the assumption that it will be permanent, the Board should be consulted and the public notified before it is closed or turned into a flag station. **Re Removal of Agents from Agency Stations**, 27 W.L.R. 387. See also **Legal Station Case**, 24 C.R.C. 7. The statutory obligation to furnish accommodation or facilities at a station relates merely to unloading and delivery of goods and does not apply to furnishing space or facilities for the warehousing or sale of such goods, even where others are accommodated. **Cuneo Fruit, Etc., Co. v. G.T.R.**, 18 C.R.C. 414. Free delivery beyond a terminal will not be ordered over tracks laid under agreement: **Kelowna v. C.P.R.**, 15 C.R.C. 441.

The Interstate Commerce Commission has repeatedly said that it was no part of the duty of a common carrier by rail to furnish warehouses for the storing of the articles transported, even though the convenience of its patrons might so require. It has consistently held that carriers might impose such charges as would compel the removal of freight from their depots and freight sheds, and in several cases sanctioned their imposition upon an ascending scale. **Wilson Produce Co. v. P.R.R. Co.**, 14 I.C.C. 170; **New York Hay Exchange Association v. P.R.R. Co.**, 14 I.C.C. 178; **Joynes v. P.R.R. Co.**, 21 I.C.C. 458; **New Orleans Storage Rules and Regulations**, 28 I.C.C. 605. The obligations of a carrier under the Railway Act are to provide facilities for arrival and departure of passengers; (**O'Reilly v. G.T.R.** (10 Dec. 1919) 26 C.R.C. 20. See also 35 I.C.C. 33, 47 and 469, 40 I.C.C. 408, 41 I.C.C. 506, 45 I.C.C. 494), subject to regulations for the proper policing of its station premises, but it is not permitted to discriminate between passengers so using its facilities. **Twin City Transfer Co. v. C.P.R.**, 15 C.R.C. 323, 16 *ibid.* 435, 11 D.L.R. 744; **Congreave v. C.P.R.**, 19 C.R.C. 423. A railway company has the right to designate the points where the travelling public will be received from cabs and busses, and where they will go for such conveyances on arrival from trains and to protect its passengers from undue importunity on its platforms. **Purcell v. G.T.R.**, 13 C.R.C. 194, 15 *ibid.* 314. Since a railway station is private property as between the company and general public, except persons using it for purposes of transportation, the company may grant the exclusive privilege to

a bus or transfer company of soliciting within its station premises the carriage of passengers and baggage: **Twin City Case**, *supra*; **Banff Livery and Busmen v. C.P.R.**, 19 C.R.C. 425. See also **Donovan v. Pennsylvania Co.**, 199 U.S. 279. Space may be rented in a station to transfer companies on different terms for each. **Twin City Transfer Co. v. C.P.R.**, 16 C.R.C. 435. In case of dispute between two transfer Companies at a station where no public interest is involved nor inconvenience to the public results from their operations, the Board will not interfere, leaving them to decide their contractual rights in the regular Courts. **City Transfer Co. v. C.N.R.**, 19 C.R.C. 427. See also **Perth General Station Committee v. Ross**, (1897) A.C. 479.

For decisions as to location and removal of stations, see section 188.

Effect of Section—Railways as Common Carriers. The effect of this section and of other sections of the Act, *in pari materia*, is to make railway companies common carriers of goods, or at least to impose upon them the same duties as those to which by the common law, common carriers are subject: **G.T.R. v. Vogel**, 11 S.C.R. 612; **Dickson v. Great Northern R.W. Co.**, 18 Q.B.D. 176; **McCormack v. G.T.R.**, 3 C.R.C. 185, 6 O.L.R. 577; and therefore they are bound at common law to carry all goods which they profess to carry upon a reasonable hire being tendered: **Pickford v. Grand Junction R.W. Co.**, 8 M. & W. 372.

Similarly an express company is fundamentally a common carrier with its obligations modified as to tolls by the Railway Act: **Graham & Strang v. Dominion Express Co.**, per Masten, J., 48 O.L.R. at p. 93, where the authorities are collected. By the terms of the statute a company must carry all traffic offered "according to its powers," so that if it has power to carry any particular kind of traffic, it must apparently do so no matter what its "professions" may be. To this extent the statute appears to impose a somewhat wider liability upon railway companies than the common law laid upon common carriers, and it has been held that under our Act, as under the English Act, they are common carriers of animals of all kinds: **McCormack v. G.T.R.**, *supra*. This is also the effect of the English decisions. Leslie Law of Transport by Railway, pp. 32-36. The Board approved (2 June, 1920, 26 C.R.C. 101) a new form of live stock bill of lading with conditions restricting the carriers' liability. See sec. 348.

One effect of this statutory obligation is that when in the performance of the obligation imposed upon them by law, they unavoidably create a nuisance, they are not liable therefor: **Bennett v. G.T.R.**, 1 C.R.C. 451, 2 O.L.R. 425, where it was held that the defendants were not liable for inconvenience caused by a cattle pen necessarily used in the business of forwarding cattle, which they kept as clean as possible. See also **Bessette v. C.P. R.**, 24 C.R.C. 113. In three particulars, however, railway companies differ from common carriers on account of the provisions of this Act—(1) their right to limit their liability by contract is curtailed; (2) their tolls must be equal; (3) they are by this section and by other provisions of the Act, subject to the general supervision of the Board, who may interfere with and regulate their manner of carrying on their business.

Tolls Must be Equal. At common law the hire charged by a carrier must be reasonable: **Baxendale v. Eastern Counties Ry. Co.**, 4 C.B.N.S. 63; but there is no duty to carry the goods of all customers at equal rates, although the fact of charging less to one customer than another is evidence, though not conclusive, that the greater charge is unreasonable: **Baxendale v. Eastern Counties Ry. Co.**, *supra*, and 27 L.J.C.P. 137; **Sutton v. Great Western Ry. Co.**, L.R. 4 H.L. 226; particularly the judgment of Blackburn, J., pp. 236, *et seq.* This and the other English cases were discussed at length in **Scott v. Midland Ry. Co.**, 33 U.C.R. 580. The common law rule has now been altered greatly by statute; section 314, *infra*, and cognate sections of this Act seek now to prevent discrimination or any other form of unequal tolls.

Liability Discussed. Subject to these remarks, the cases nearly all proceed upon the principles applicable at law to carriers of goods and passengers, and we may now enquire what are the duties of railway companies—(1) as carriers of persons; (2) as carriers of goods for hire; (3) as warehousemen; (4) how far can they limit their common law ability as carriers; (5) who may sue them for a breach of duty; and (6) the measure of damages.

1. Liability as Carriers of Persons.

(a) General Liability.

The distinction between the liability of carriers of goods and carriers of passengers was laid down at an early date, and before the days of railways, it was said

that while carriers of goods were insurers, carriers of passengers were liable only for negligence in the performance of their contract: **White v. Boulton**, 1 Peake 113; and there are numerous English cases emphasizing this distinction. These cases are discussed and collected in **Redhead v. Midland Ry. Co.**, L.R. 2 Q.B. 412, 4 Q.B. 379, which lays down the general principle that "the contract made by a general carrier of passengers for hire, with a passenger, is to take due care (including in that term the use of skill and foresight) to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected them." See also **Blamires v. Lancashire and Yorkshire Ry. Co.**, L.R. 8 Ex. 283; **Clarke v. West Ham Corporation** (1909) 2 K.B. 858. The liability of railways to passengers was discussed, and the distinction adverted to drawn, in **Sutherland v. G.W. Ry. Co.**, 7 U.C.C.P. 409, where a history of the law and cases on the subject appears, and a further discussion will be found in **Braid v. Great Western Ry. Co.**, 10 U.C.C.P. 137, affirmed 1 Moore's P.C. Reports N.S. 101. This principle was applied to a case in which the plaintiff was properly riding on a freight train and was injured, but was unable to show any negligence on the part of the railway company, and the rule was laid down that a person using a freight train could not expect the same degree of care as one using a passenger train: **Hutchinson v. C.P.R.**, 17 O.R. 347.

Similarly, the Government of Canada was not liable for an accident happening on the Intercolonial Railway owing to a latent defect in an axle which broke during the journey, the onus being on the plaintiff to prove negligence: **Dube v. The Queen**, 3 Ex. C.R. 147; see also **Badgerow v. G.T.R.**, 19 O.R. 191, at p. 195; and the whole subject was considered in **C.P.R. v. Chalifoux**, 22 S.C.R. 721, reversing **Chalifoux v. C.P.R. Co.**, M.L.R. 2 S.C. 171, 3 Q.B. 324, where English, American and Quebec cases are discussed, and the English common law rule was applied to the Province of Quebec. In that case the accident happened through a rail breaking during very cold weather on a part of the track which had been properly patrolled by defendants' section men. The New York case of **McPadden v. New York Central Ry. Co.**, 44 N.Y. 478, was referred to, and the principles there laid down were adopted. See also **Ferguson v. C.P.R.**, 12 O.W.R. 943.

In **Quebec Central Ry. Co. v. Lortie**, 22 S.C.R. 336, it was held that a passenger who chose to get off a train where there was no platform, could not recover for injuries received when he might, by going through a car, have alighted at the station platform. The general principle was affirmed in **East India Ry. Co. v. Kalidas** (1901), A.C. 396, in which a man was killed by explosives done up in a parcel and brought into a car by another passenger who was also killed. The railway company did not know what was in this bundle when it was brought in, and, therefore, there was no evidence of negligence on their part. So also a railway company was not liable for injuries caused to a passenger by closing a carriage door on his hand, when they did not know it was there: **Drury v. North Eastern Ry. Co.** (1901), 2 K.B. 322. Where a passenger in an overcrowded car got up to prevent others entering and put his hand on the door-jamb, and the porter, not knowing this, closed the door, thus injuring the passenger's finger, he could not recover, because though the overcrowding may have been evidence of negligence, it was not the proximate cause of the accident: **Metropolitan Ry. Co. v. Jackson**, 3 A.C. 193; and it is for the passenger who suffers from such an accident to make out a *prima facie* case of negligence: **Perdue v. C.P.R.**, 12 C.R.C. 216; **Cohen v. Metropolitan Ry. Co.**, 6 Times L.R. 146; **Cormier v. Dominion Atlantic Ry. Co.**, 3 C.R.C. 304; **Breman v. G. S. & W. Ry.** (1904) 38 I.L.T. 177; **Taylor v. G. S. & W. Ry.** (1909), 2 I.R. 330. But where a train starts suddenly and a passenger supports himself by the door post and the door closes owing to the starting of the train, thereby injuring his hand, negligence may be inferred. **Delaney v. Metropolitan Ry. Co.** (1920) 36 T.L.R. 190, 596, (1921) 37 T.L.R. 520, also (1921) W.N. 118 in the House of Lords. In **G.T.R. v. Mayne**, 22 C.R.C. 218, 39 D.L.R. 691, 56 S.C.R. 95, and **C.P.R. v. Hay**, 24 C.R.C. 359, 46 D.L.R. 87, 58 S.C.R. 283, it was held that passengers were not justified in jumping from a moving train even with the acquiescence or upon the invitation of the conductor or brakeman, while in **Gazey v. Toronto Ry. Co.**, 22 C.R.C. 233, 38 D.L.R. 637, 40 O.L.R. 449, the circumstances were held to justify such action by a passenger. If a passenger gets up to shut an open door and falls out, when he might have been on the safe side and have suffered the slight inconvenience of it being open, instead of incurring the evident danger of getting up to close it, he cannot recover damages for his fall from the train: **Adams v. Lancashire, etc., Ry. Co.**, L.R. 4 C.P. 739. This case was dis-

cussed somewhat unfavorably, however, in **Gee v. Metropolitan Ry. Co.**, L.R. 8 Q.B. 161. A person will be justified in jumping out of a carriage to avoid apparently imminent peril, even though he may be thereby injured; but the peril must at least appear imminent and serious enough to justify a reasonable and prudent man in taking such a risk: **Jones v. Boyce**, 1 Stark 493; **Kearney v. Great Southern, etc., Ry. Co.**, 18 L.R. Ir. 303. See cases under section 188 also.

Where the Maxim Res Ipsa Loquitur is Applicable.

Erle, C.J., lays down the general rule in these terms—"When the thing is shown to be under the management of the defendant or his servants and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." **Scott v. London Dock Co.** (1865) 3 H. & C. 596. The question is fully discussed in the notes to **Pyne v. C. P.R.**, 23 C.R.C. 281, at pp. 305-310. The maxim is not a rule of law which compels the defendant in certain cases to disprove negligence, but is rather a rule which authorises a presumption of negligence to be drawn upon proof of certain facts although these facts do not establish how the accident happened and the consequence of which is that the defendant may be held liable unless he shows that the presumption of negligence is unjustified. This rule has been held applicable to railway accidents in **Flannery v. Waterford and Limerick Ry. Co.** (1877) I.R. 11 C.L. 30 with the important qualification that it does not apply on proof of a railway accident of any kind. In certain classes of cases the rule undoubtedly applies as in a case of collision on the same railway track or at the junction of two tracks. **Skinner v. L.B. & S.C. Ry. Co.** (1850) 5 Ex. 787. **Ayles v. S.E. Ry. Co.** (1868) L.R. 3 Ex. 146; **Burke v. M.S. & L. Ry. Co.** (1870) 22 L.T. 442, **Bird v. Great Northern Ry. Co.**, 28 L.J. Ex. 3. In case of a collision between trains on parallel tracks owing to the load in one of the waggons shifting, no *prima facie* case of negligence is shown—the plaintiff must prove that such shifting was due to negligent loading. **Hanson v. L. & Y. Ry. Co.** (1872) 20 W.R. 297: similarly where a passenger is injured through a collision between a train and animals on the track or the failure to stop before reaching them, that this was due to the company's negligence. **Patchell v. Irish North Western Ry. Co.** (1871) I.R. 6 C.L. 117. The fact that the train

is derailed speaks for itself. **Carpue v. L. B. & S.C. Ry. Co.** (1844) 5 Q.B. 747. See also **Ferguson v. C.P.R.**, 12 O.W.R. 943. The rule also applies to the case of a passenger being injured through a carriage door flying open, if he did not act unreasonably in treating it as secure. **Gee v. Metropolitan Ry. Co.** (1873) L.R. 8 Q.B. 161: **Richards v. G. E. Ry. Co.** (1873) 28 L.T. 711: **Cooper v. Caledonian Ry. Co.** (1902) 4 Sess. Cas. (5th series) 880 or while the train was moving off at the station with the door of the carriage open: **Toal v. North British Ry. Co.** (1908) A.C. 352, and to an accident to a passenger caused by the breaking of an equalizing bar on a passenger coach: **Pyne v. C.P.R.**, *supra*, 43 D.L.R. 625, 48 D.L.R. 243, affirmed in the Privy Council, leave being refused to appeal.

If a train is stopped violently and passengers are injured, then *res ipsa loquitur*, **Angus v. L.T. & S. Ry. Co.** (1906) 22 T.L.R. 222, or when a train starts without giving passengers time to get in or out: **Gemmell v. G. & S. W. Ry. Co.** (1881) 18 Sc., L.R. 627, or where, after invitation to alight the train is suddenly jerked owing to a brake being released, **L. & N.W. Ry. Co. v. Hellowell** (1872) 26 L.T. 557; *contra*, **Goldberg v. G. & S.W. Ry. Co.** (1907) S.C. 1035. Where a railway embankment gave way and an injury is alleged to have occurred owing to its improper construction, the maxim applies: **G.W. Ry. Co. v. Braid** (1863), 1 Moo. P.C.N.S. 101; but a window suddenly falling is not *prima facie* evidence of insecure fastening: **Murray v. Metropolitan Ry. Co.**, 27 L.T.N.S. 762; and a passenger who falls out of a sleeping car berth while changing her position cannot recover without affirmatively proving negligence: **C.P.R. v. Smith**, 1 C.R.C. 255 (31 S.C.R. 367), reversing the Supreme Court of Nova Scotia, reported 1 C.R.C. 231, where the cases are discussed at length.

So soon as the defendants have satisfactorily accounted for the fact upon which the plaintiff relies as affording the presumption of negligence, the onus is re-shifted to the plaintiff. **Ferguson v. C.P.R.**, *supra*.

Where a passenger in going from one "vestibule" car to another, falls out of a door which has been opened by some unknown means and is killed, his personal representatives cannot recover: **Campbell v. C.P.R.**, 1 C.R.C. 258. The subject of injuries to passengers getting on and off trains has been dealt with in the notes to section 188, *ante*.

Liability to Persons Other Than Passengers. In **Nightingale v. Union Colliery Co.**, 2 C.R.C. 47, 35 S.C.R. 65, where a contractor of the defendants was riding for his own convenience on defendants' locomotive, and was killed by the engine falling through a defective bridge, it was decided that even without any contract relieving the company from liability, the person who uses railway facilities without paying for them, cannot recover any damages for negligence, but only for that "gross" negligence and reckless and wilful disregard of another's safety, that leading into a "trap," which is aptly described by the term "**dolus**."

A similar case, **Harris v. Perry** (1903), 2 K.B. 219, was decided by the English Court of Appeal. In that case the jury found that the plaintiff was on the engine for his own convenience, but with the permission of the defendant's representative, and that the accident was due to the negligence of the defendant's servants. The Court held that the defendant's liability was that of a person who undertakes the carriage of another gratuitously, that the care to be exercised must be reasonable under the circumstances, that there was evidence of such a failure of care on the part of the defendant's servants as would make them responsible for damages arising therefrom, and that the plaintiff was entitled to judgment.

Collins, M.R., in delivering judgment, says at p. 226, that the authorities imply a larger obligation than that of merely not setting a trap. He refers to **Foulkes v. Metropolitan District Ry. Co.** (1880), 5 C.P.D. 157, at p. 165, and also to the discussion in Beven on Negligence in Law, 2nd Ed., Vol. 2, pp. 1154, *et seq.* See also **G.T.R. v. Barnett** (1911) A.C. 361, 12 C.R.C. 205, where no breach of duty was shown to the plaintiff, a trespasser.

Payne v. Terre Haute Ry. Co., 56 L.R.A. 472; **Purple v. Union Pacific Ry. Co.**, 57 L.R.A. 700; **Chicago, etc., Ry. Co. v. Sattler**, *ibid.*, 890, and **Bolton v. Missouri Pacific Ry. Co.**, 72 S.W.R. 530, are American decisions to the effect that no special liability, apart from reckless or wilful misconduct, rests upon a railway company in favor of a mere trespasser upon the trains, nor, except with certain limitations, in favor of one not a trespasser but a mere licensee.

The mere fact that a conductor may have permitted the plaintiff to ride free upon a train without the consent of the carrier will not enlarge the company's liability.

ity: **Graham v. Toronto, etc., Ry. Co.**, 23 U.C.C.P. 541, and the payment of a bribe to a conductor to enable the person injured to ride upon a train not intended for passengers will, very naturally, fail to assist him to recover damages: **C.P.R. v. Johnson**, M.L.R. 6 Q.B. 213. From the argument for the railway in the latter case, and from the judgment of Cross, J., it would appear that the decision there was based upon the fact that, the plaintiff being carried free, there was no consideration for the contract of carriage, and therefore no action could be based upon such contract, but there are English and Ontario cases which show that where the plaintiff is rightfully on the train, he can recover damages for injuries, even though he has paid nothing for his passage. This applies to a company's workman who is being conveyed to his place of business: **Torpy v. G.T.R.**, 20 U.C.R. 446; to an employee of an express company carried free under an arrangement between the railway and his employers: **Jennings v. G.T.R.**, 15 A.R. 477, affirmed as to the measure of damages, 13 A.C. 800; but not where the contract between the employer and the railway does not authorise the free transportation of the former's workmen, but the train officials permit it: **Sheerman v. Toronto, etc., Ry. Co.**, 34 U.C.R. 451; though where a newspaper reporter travelled on a fellow-reporter's pass which was marked non-transferable, the reporter when injured was awarded damages on proving a custom on the part of the railway company which in effect abrogated the condition of non-transferability: **Great Northern Ry. Co. v. Harrison**, 10 Exch. 376. And a government servant carried under a statutory duty who has no contract with the company, for the carriers' liability exists irrespective of contract: **Collett v. L. & N.W. Ry. Co.** (1851), 16 Q.B. 984. So also a person in the employ of the Government travelling free on Government business was allowed to recover for luggage lost: **Martin v. Great Indian, etc., Ry. Co.**, L.R. 3 Ex. 9; as was a person whose passage was paid for by a benefit society; **Skinner v. London, etc., Ry. Co.**, 5 Exch. 787; and a servant whose ticket had been purchased by his master: **Marshall v. York, etc., Ry. Co.**, 11 C.B. 655, the ground of action being the breach of duty towards the servant which the company assumed when they undertook to carry him, as distinguished from any contractual remedies which the person who bought his ticket might have; but in **Alton v. Midland Ry. Co.**, 19 C.B.N.S. 213, where the ticket was bought by the employee for the purpose of travelling on his employer's business, it was held that no corresponding duty was owing to the master on

account of loss of the servant's services due to injuries received on his journey. A somewhat extreme instance of liability towards a person carried free is to be found in **Austin v. Great Western Ry. Co.**, L.R. 2 Q.B. 442, where a mother who had bought a ticket for herself, brought with her into the train without any fraudulent intention a child who was, according to the company's regulations, too old to travel free. The child was injured in an accident arising from the negligence of the defendants. It was also shown that the mother had the plaintiff with her when she bought her ticket, and no questions were asked about the latter's age. The Court of Queen's Bench held that the contract was to carry both the mother and the child for one fare, and though the former might be liable for the child's fare that did not prevent the latter from recovering damages which resulted from the defendant's negligence; and that the mother's concealment did not alter the child's rights. **Quære**, would fraud on the mother's part, if proved, have altered the liability of the defendants? This question was raised by Blackburn, J., but not answered. Where a plaintiff, having bought a return ticket from one company, came back on a train of defendants, who had running rights over the former's line and divided the profits with it, he was allowed to retain a verdict for injuries sustained, on the ground that the latter company had permitted him to be upon the train and therefore owed him protection from injuries resulting from their negligence or default: **Foulkes v. Metropolitan District R.W. Co.**, 4 C.P.D. 267, 5 C.P.D. 157. Some discussion upon the subject is also to be found in the argument in **Braid v. Great Western Ry. Co.**, 10 U.C.C.P. 137, at page 142, and in the judgment of the Privy Council in **Great Western Ry. Co. v. Braid**, 1 Moore P.C. (N.S.) 101.

In the case of **Ryckman v. Hamilton, etc., Ry. Co.**, 4 C.R.C. 457, 10 O.L.R. 419, all the decisions are referred to, and applying the principles of **Austin's Case**, *supra*, the defendants were held liable to the wife of one of their servants who was traveling on an unconditional free pass and was injured in a head-on collision between two cars on defendants' railway. It was held that the collision must be evidence of gross negligence if that were required to be established.

It is now settled law that the remedy of a person injured on a train does not depend solely upon any contractual relationship between the carrier and himself or

upon payment of fare; but, in addition to such contractual liability, the carrier owes a duty of reasonably safe carriage to all who are upon its trains with its permission, even though no fare is paid for the trip; but that where no permission to travel has been given other than the unauthorised permission of those in charge of the train, the traveller cannot recover except, as before mentioned, for fault on the part of the railway company amounting to **dolus**.

A young child incapable of looking after himself is carried subject to an implied condition that the person in charge of him will take care of him and if he is injured through the contributory negligence of that person, he cannot recover against the railway company, even though its negligence contributed to the injury. **Waite v. N.E. Ry. Co.** (1858) E. B. & E., 719, 728.

Of course, where a person travels otherwise than on the ordinary passenger train, even though he has the company's permission to travel by some other conveyance, as on a freight train, he cannot expect that the same care will be exercised as he has a right to look for upon conveyances intended for passengers: **Hutchinson v. C.P.R.**, 17 O.R. 347, 16 A.R. 429. Where a newsboy boarded a car to sell papers, in accordance with the usual custom, it was suggested, though not definitely decided, that he was not a passenger but at most a licensee, and therefore was not entitled to the same degree of care as a passenger: **Coll v. Toronto Ry. Co.**, 25 A.R. 55, at p. 59.

Appliances and Accommodation. Section 298, *ante*, prescribes certain appliances which must be used on trains, and gives an express right of action to all who are injured by a breach of that section. Apart from such express right, however, it is probably true that anyone suffering special and peculiar injury on account of a failure to observe such statutory precautions as are provided, could recover damages for that injury, and so a person injured by a failure to provide communication between the conductor and engine driver, as required by that section, could no doubt recover at common law: **Blamires v. Lancashire, etc., Ry. Co.**, L.R. 8 Ex. 283. But the neglect of a statutory duty imposed for the benefit of a certain class of people (for example, the neglect to fence for the protection of adjoining landowners) would not of itself vest a right of action in a passenger on the train injured by a collision with cattle trespassing on the track: **Buxton v. North Eastern Ry. Co.**, L.R. 3 Q.B. 549;

Gorris v. Scott, L.R. 9 Ex. 125. It is the duty of a conductor to ensure, as far as he reasonably can do so, the comfort and safety of passengers under his charge: **Blain v. C.P.R.**, 2 C.R.C. 69 and 85, 5 O.L.R. 334, and it has been said that a passenger is entitled to accommodation according to his contract, and in the absence of express contract, he is entitled to all reasonable and usual accommodation: MacNamara on Carriers, art. 346, p. 538, 2nd Edn. On an unconditional contract to carry, a railway is generally bound to find room for all who offer themselves for carriage: **Hawcroft v. Great Northern Ry. Co.**, 21 L.J.Q.B. 178; and in ordinary cases they are expected to furnish seats for their passengers: 5 Am. & Eng. Ency. of Law, 2nd Ed. 590, **Davis v. Kansas City**, 53 Md. 317; but if there should be any unusual or unexpected influx of intending passengers they cannot be expected to do so: **Louisville Ry. Co. v. Patterson**, 69. Miss. 421. If there are two cars, one of which is filled and another containing empty seats, a traveller cannot compel the conductor to find him room in the crowded car: **Pittsburg v. Van Houten**, 48 Ind. 90. In **Metropolitan Ry. Co. v. Jackson**, 3 A.C. 193, Lord Cairns, at page 198, seems to consider it negligence on the part of a railway company to admit more passengers to a compartment than there are seats. As mentioned in **Blain v. C.P.R.**, 2 C.R.C. 69 and 85, 3 C.R.C. 143, a conductor in the interests of those travelling has a right and is bound according to the means at hand to preserve order; and apart from the statutory power to eject, which will be discussed in notes to sec. 354, he may eject a passenger who persists in putting his feet on the seats: **Davis v. Ottawa Electric Ry. Co.**, 28 O.R. 654. But though equal accommodation must be afforded all paying the usual and proper charge therefor, there is nothing to prevent a railway company from furnishing additional comforts and luxuries for those willing to pay an increased charge therefor: Hutchison on Carriers, 2nd Ed., s. 542; **Day v. Owen**, 5 Mich. 520; **Westchester Ry. Co. v. Miles**, 55 Penn St. 209. A lady who buys a second class ticket cannot be compelled to travel in a smoking car on the ground that that is the second class car: **Jones v. G.T.R.**, 4 C.R.C. 418, 9 O.L.R. 723.

Continuous Journey. Where a passenger contracts for a continuous journey, he is entitled to be carried the whole distance for the toll paid, and a charge made for additional fare in transferring him from one station to another in a town on his line of route is illegal: **Clarry v. G.T.R.**, 29 O.R. 18; but similarly a person contracting for

a continuous journey only, without "stop over" privileges may not break his journey at an intermediate point: **Coombs v. The Queen**, 4 Ex. C.R. 321; 26 S.C.R. 13, following and applying **Craig v. Great Western Ry. Co.**, 24 U.C.R. 504; **Briggs v. G.T.R.**, *ib.* 510, and **Cunningham v. G.T.R.**, 9 L.C. Jur. 57, 11 L.C. Jur. 107.

Protection of Passengers. This subject is discussed at length in the notes in 2 C.R.C. 96, *et seq.* In **Blain v. C. P.R.**, 2 C.R.C. 69 and 85; **C.P.R. v. Blain**, 3 C.R.C. 143, the rule is laid down that if a railway company through its officers, knows that an assault upon a passenger is probable, it is the former's duty to take reasonable precautions to prevent it, and if it fails to do so, it is liable for the consequences of its neglect. The English case of **Pounder v. North Eastern Ry. Co.** (1892) 1 Q.B. 385, which is a decision to the contrary, was not followed. In the case of **Cobb v. Great Western Ry. Co.** (1894), A.C. 419, Lord Selborne had already dissented from the opinion expressed by the judges in the **Pounder Case**, so that as regards Canada at least, it may be taken to be overruled so far as it purports to lay down any general proposition of law. The American decisions, as a rule, concur in the views stated by the Judges in **Blain v. C.P.R.** See **Putnam v. Broadway, etc., Ry. Co.**, 55 N.Y. 108; **New Orleans, etc., Ry. Co. v. Burke**, 53 Miss. 200; **Lucy v. Chicago, etc., Ry. Co.**, 64 Minn. 7, and 5 Am. & Eng. Ency., 2nd Ed. 553. In **Bryce v. Southern Ry. Co.**, 125 Fed. R. 958, a distinction was made between acts of nonfeasance or omission and misfeasance in failing to protect a passenger, and it was said that for the former the servant would only be liable to his employer and not to the passenger. The correctness of this decision was doubted by a writer in the New York Law Journal for 1904, p. 2040, and cases to the contrary are there cited.

Compare with the decision in the **Blain case**, *supra*, the later Irish case of **Adderley v. Great Northern Ry. Co.** (1905), 2 I.R. 378, where the liability of a railway company for injury to a passenger caused by a window being broken by a person admitted to the platform who was obviously drunk, was discussed in the Court of Appeal and similar principles were applied to the circumstances of the case.

In **Fraser v. Caledonian Ry. Co.**, 5 F. (Ct. of Sess.) 41, it was decided that where defendants knowingly and without taking proper steps to prevent it, had allowed a greater crowd of intending passengers to congregate on

a platform than it would hold, and plaintiff was knocked off and hurt, he might recover.

The case of **McCormick v. Caledonian Ry. Co.** (1904) 6 F. (Ct. of Sess.) 362, deciding that having carried a drunken man to his destination the Company is not bound to take any special care to see that he leaves its premises in safety, may be compared with the recent case of **Dunn v. Dominion Atlantic Ry. Co.**, 52 D.L.R. 149, 60 S.C.R. 310, where a drunken passenger put off a train after midnight at a closed and unlighted station wandered off and lay down on another track where his dead body was found some hours later in a condition indicating that he had been killed by a passing train, and it was held that putting the passenger off when in a state not to take care of himself at such a place and at such an hour was negligence on the part of the Company, which led to his death. In that case it was held that the right of a conductor on a railway train to eject a passenger for disorderly conduct is not absolute but must be exercised with proper precaution to avoid putting the passenger in danger.

2. Liability of Carriers of Goods.

As already mentioned, railway companies are common carriers of goods and therefore, apart from contract or statute, they are liable as insurers for all goods which they undertake to carry: **Coggs v. Bernard**, 1 Sm. L.C. 11th Edw, 173, 211; **Ham v. McPherson**, 6 O.S. 360; and see **Culver v. Lester**, 37 Can. L.J. 421, a learned judgment of McDougall, Co. J., York, where the subject of common carriers is discussed at length. But if a person does not profess to carry goods of the character sued for, he is not liable as a common carrier for their loss. The liability as bailee, of course, would exist: **Roussel v. Aumais**, Q.R. 18 S.C. 474.

9. The only defences to this liability at common law are that the accident resulted without negligence on his part, from an Act of God, the King's enemies, the fault of the consignor, or inherent vice or natural deterioration of the thing carried: **Coggs v. Bernard** and **Ham v. McPherson**, *supra*; **Nugent v. Smith**, L.R. 1 C.P.D. 19 and 423; **Blower v. Great Western Ry. Co.**, L.R. 7 C.P. 655; **Kendall v. London and South Western Ry. Co.**, L.R. 7 Ex. 373.

The Act of God .

James, L.J. gives this definition in **Nugent v. Smith** (1876) 1 C.P.D. 423. "The 'Act of God' is a mere short

way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him." It is not a necessary element of an Act of God that no human skill or foresight could have resisted it or that no human ability could have prevented it. If the carrier uses all known means to which prudent and experienced carriers have recourse, he will not be liable though he is overpowered by storm or other natural agency. The proper question is, whether, at the time he was overcome, the carrier was using all proper precautions to avoid danger which he ought reasonably to anticipate, not whether the particular casualty might have been prevented by special means which are not generally known. See Leslie on the Law of Transport by Railway (1920), p. 22, citing **Nugent v. Smith, supra**. **The Thomas Powell v. The Cuba** (1866) 14 L.T. 603, **The Uhla** (1867) 19 L.T. 89, nor need an act be unprecedented to be an Act of God: lightning, **Forward v. Pittard** (1785) 1 T.R. 27; and storm, **Nugent v. Smith, supra**, are typical occurrences which may be acts of God and are not unprecedented. But if a phenomenon has happened before it is a question of fact whether it is so likely to occur again that the carrier is bound to take precautions against it. **Nitro Phosphate Co. v. London Docks Co.** (1878) 9 Ch. D. 503, **Burt v. Victoria Graving Dock Co.** (1882) 47 L.T. 378.

In the recent case of **Pleet v. C.N.Q. Ry. Co.**, 56 D.L.R. 404, the defendants at the trial were held not liable for the contents of a car loaded with potatoes frozen while in transit. The First Appellate Division, Ontario, Ferguson, J.A., 20 O.W.N. 113, reversing this judgment, held that the railway company had not discharged the burden of proving affirmatively that they took all reasonable precautions, means and care to prevent freezing and that the means used to transport and protect the potatoes were all the known means to which prudent and experienced carriers have recourse, and that there was no negligence in the operation of these means.

The Supreme Court of Canada dismissed an appeal from this decision, December 15, 1921.

The King's Enemies.

There are very few modern authorities on the point, the defence is usually raised in shipping cases. See Leslie on Transport by Railway, p. 24.

When a carrier is guilty of deviation he cannot rely on an express or implied exemption of the King's enemies unless he can prove that the casualty must have occurred whether he deviated or not. **Morrison v. Shaw Savill Co.** (1916) 2 K.B. 783. A carrier is bound to take reasonable precautions against the King's enemies.

Deviation.

Unnecessary deviation by a common carrier from the route which he contracts to follow, or (in the absence of such contract) which he customarily follows or publicly holds himself out to follow, in the carriage of goods entrusted to him, is a breach of his duty and may deprive him of the protection afforded by special conditions in his contract and even of the benefit of his common law exemptions from liability: **Sleat v. Fagg**, 5 B. & Al. 342; **Garnett v. Willan**, 5 B. & Al. 53; **Johnson v. Midland Ry. Co.**, 18 L.J. Ex. 366; **Mallett v. Great Eastern Ry. Co.** (1899), 1 Q.B. 309; **Gunyon v. South Eastern Ry. Co.** (1915) 2 K.B. 370; **Neilson v. London & N.W. Ry. Co.** (1921) 3 K. B. 213, the last mentioned case distinguishing **Foster v. Great Western Ry. Co.** (1904) 2 K.B. 306, on the ground that the deviation in the **Neilson Case** was intentional, though the result of a bona-fide error, whereas in the **Foster Case** it resulted from mere neglect to remove the goods from the car. An appeal in the **Neilson Case**, resulted in the **Foster Case**, being expressly over-ruled (1922) 1 K.B. 192. In cases of carriage by sea the rule has been applied very strictly: **Thorley v. Orchis Steamship Co.** (1907) 1 K.B. 660; **Morrison v. Shaw** (1916) 2 K.B. 783.

Deviation is permissible under certain circumstances, for instance, to avoid perils and probably also to get around an impassable portion of the customary route. For the latter purpose it is expressly sanctioned by the bill of lading in common use in Canada.

The form of rail bill of lading approved by the Board provides for a direction by the shipper as to the routing. The railway, however, is not bound to accept these directions in all cases. It is entitled to consult its own interests and so to route traffic originating on its own system as to give it the longest haul over its own lines: **Plymouth, etc., Ry. Co. v. Great Western Ry. Co.**, 10 Ry. & C. Tr. Cas. 68. It need not supply its cars to carry traffic over other lines: **C.P.R. v. Nelson, etc., Ry. Co.**, 11 C.R.C. 400; particularly in case of car shortage on its own system; **Imperial Steel Co. v. G.T.R.**, 11 C.R.C. 395; **Riddle v. Pittsburgh, etc., Ry. Co.**, 1 I.C.C. 374. It has

even been held that a railway company which has accepted a shipment specifically routed by the shipper may disregard the shipper's instructions and adopt a routing more advantageous to itself if it is not less advantageous to the shipper: **Jacobs Asbestos Co. v. Quebec Central Ry. Co.**, 19 C.R.C. 357. See note on this case, 19 C.R.C. 363.

But the Board, while recognizing the carrier's right to the reasonable benefit of the "long haul"—(which seems to be analogous to the carrier's right at common law to carry by his customary route, notwithstanding that another route may be shorter or otherwise more advantageous to the shipper: **Hales v. London & N.W. Ry. Co.**, 4 B. & S. 66; **Myers v. London etc., Ry. Co.**, L.R. 5 C.P. 1)—has power under sec. 317 to control the supply and movement of cars and will exercise that power in a proper case so as to insure that there shall be no unjust discrimination between points on and off the line of the initiating carrier and that the public interest shall be served by facilitating transfer of freight from one line to another: **Re Coal Transportation Facilities**, 22 C.R.C. 338.

The Fault of the Consignor.

In *Leslie on Transport by Railway*, *supra*, the earlier cases are collected at pp. 25-6, such as **Batson v. Donovan** (1820) 4 B. & A. 21. In **Bradley v. Waterhouse** (1828) M. & M. 154, the carrier's exemption in cases where the loss is due to the fault of the consignor is clearly stated. There money was sent in a package containing tea for which the ordinary rate was paid and the package was stolen. The jury found that the plaintiff brought this loss upon himself by his manner of conducting business—the sender knew that the carrier was not liable above £5, unless a special rate was paid but he preferred to take the risk.

The general principle is that a common carrier is no more liable for a loss due to the act or omission of the owner than another bailee, similarly with regard to a passenger's luggage. **Talley v. G.W. Ry Co.** (1870) 6 C.P. 44.

If goods be damaged in transit because the consignor omits to pack them properly he cannot recover. **Hart v. Baxendale** (1867) 16 L.T. 391; **Barbour v. S.E. Ry. Co.** (1876) 34 L.T. 67; **Cox v. L. & N.W. Ry. Co.** (1862), 3 F. & F. 77; **Baldwin v. L.C. & D. Ry. Co.** (1882) 9 Q.B. 582.

Damages due to bad packing may be deducted from those due to the negligence of the carrier. **Higginbotham v. G.N. Ry. Co.** (1861) 2 F. & F. 796. The authorities are conflicting as to whether a common carrier may refuse goods because insufficiently packed. **Munster v. S.E. Ry. Co.** (1858) 4 C.B.N.S. 676. **Simons v. G.W. Ry. Co.** (1856) 18 C.B. 804. In **Sutcliffe v. G.W. Ry. Co.** (1910) 1 K.B. 478 the last case was distinguished and it was held that "a common carrier is not bound to carry articles tendered without such protection of packing as is necessary to enable the company to carry the goods with a reasonable prospect of security during transit," per Kennedy, J., p. 503. This statement is accepted in **L. & N.W. Ry. Co. v. Hudson** (1920) A.C. 324; the Lords did not agree whether the defective sheeting of a railway truck was defective packing, but it was held in that case that it was the duty of a common carrier to provide a suitable covering for the goods carried where from their nature they required it. Where there is no obvious defect in packing the carrier is not liable for damage resulting from the goods being treated as properly packed. **Richardson v. N.E. Ry. Co.** (1872) L.R. 7 C.P. 72.

In **Gould v. S.E. Ry. Co.** (1920) 2 K.B. 186, a divisional court held that a carrier is not liable for the result of bad packing if he is aware of it but makes no protest. His knowledge is only material to the question whether he was negligent in handling the goods.

Where goods carried at a lower rate, were insufficiently packed, and wrongly described—being called hardware, whereas they were electric fittings in china and porcelain—it was pointed out that hardware would not be handled as carefully as fittings of this character, and the defendants were relieved from liability: **Connelly v. Great Northern Ry. Co.**, 15 Leg. News. 365.

These defences are recognised in the Standard Merchandise Bills of Lading approved by the Board (c) being described as "the act or default of the shipper."

If the damage is caused by the Act of God and the carrier's negligence, he may be able to show that some damage would have ensued without his negligence and that it is not impossible to assess the damage solely due to the excepted peril or he will be liable for the whole. **Nitro Phosphate Co. v. London Docks Co.**, 9 Ch. D. 503. **The Europa** (1908), P.D. 84. The carrier will be excused if the negligence in no way contributes to the damage by the Act of God. **The Buckhurst** (1881) 6 P.D. 152.

The inherent vice or natural deterioration of the thing carried.

In **Brass v. Maitland** (1856) 6 E. & B. 470, it was held that a shipper is bound to disclose dangerous propensities of goods shipped which are known to him but not to the ship owner and failure to do so will make him liable to the ship owner for damage caused by the goods to the rest of the cargo. In **Hudson v. Baxendale** (1857) 2 H. & N. 575, it was held that a carrier was not liable for a deficiency in a cask of gin due to leakage in transit. Other similar cases are **Hutchinson v. Guion** (1858) 5 C. B.N.S. 149; **Farrant v. Barnes** (1862) 10 C.B.N.S. 553; **Ohrloff v. Briscall** (1866) L.R. 1 P.C. 231.

There is no implied warranty on the part of the owner of the goods carried where the carrier had equal opportunities with the shipper of examining the goods and judging of their fitness. **Acatos v. Burns** (1878) 3 Ex. D. 282, but in **Bamfield v. Goole & Sheffield Transport Co.** (1910) 2 K.B. 94, it was held that a person tendering goods to a common carrier, the nature of which the carrier has no means of judging unless he makes disclosure, gives an absolute warranty that the goods are fit for ordinary carriage and not dangerous, per Fletcher Moulton and Farwell, L.JJ. Where defendants contracted to carry plaintiff's engine on their railway to another town, and in drawing it to the railway station by their horses harnessed to the shafts with which it was fitted for that very purpose, one of the shafts broke through a defect unknown to either party and the engine was damaged, this was described as vice inherent in the thing carried, and plaintiff's action was dismissed: **Lister v. Lancashire, etc., Ry. Co.** (1903), 1 K.B. 878.

Where fresh meat has been delayed twenty-two hours in summer reaching its destination, the defendants could not set up successfully that the consequent injury to the meat was owing to its perishable nature: **Delorme v. C. P.R.**, 11 Leg. News 106; and see **Pontbriand v. G.T.R.**, M.L.R. 3 S.C. 61; but where the heating of hay in transit causes increased evaporation and consequent shrinkage, the company on showing such facts are not liable: **Seymour v. Sincennes**, 1 R.L. 716.

Mr. Leslie in his work already cited, at p. 32 thus sums up the effect of the cases: "Every one who tenders goods to a common carrier relying on his duty to carry, impliedly warrants, unless he makes a proper disclosure, that they are reasonably fit to be carried, and, if they are not

fit, he is liable for injuries caused to other goods or to the carrier or his servants."

Accommodation and Appliances. Section 312 and the other sections of this Act prescribe in certain instances the character of appliances and accommodation which must be furnished by railway companies. Generally speaking, the accommodation must be adequate to the ordinary conditions of the business which a carrier undertakes, and where a shipowner received sheepskins in a boat admittedly unfit to carry them, and they were damaged in consequence, the defendants were held liable, and upon the construction of a bill of lading containing provisions exempting them from liability for "unseaworthiness," it was held that these conditions afforded no defence: **Rathbone v. MacIver** (1903), 2 K.B. 378. In all cases of carriage of goods by water, "the common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to avoid this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation," per Bigham. J.: **Waikato v. New Zealand Shipping Co.** (1898) 1 Q.B. 645, at p. 647, affirmed (1899), 1 Q.B. 56. Where a carrier undertakes to carry gold, and it is known that he has a bullion room for that purpose, a contract is implied that the room is strong enough to resist the attacks of thieves: **Queensland Bank v. Peninsula and Oriental, etc., Co.** (1898) 1 Q.B. 567; and a carrier who holds itself out as willing to carry goods to a certain place cannot refuse to carry for any one tendering goods for transport there: **Crouch v. London, etc., Ry. Co.** 14 C.B. 255; **Garton v. Bristol and Exeter Ry. Co.,** 1 B. & S. 112, at p. 162.

Connecting Carriers. Though this subject depends largely upon the contracts contained in bills of lading and the effect of statutory restrictions upon the right to contract against negligence on the part of railway companies, it may be conveniently dealt with here subject to what is afterwards said about the limitations imposed by statute. The general rule in the case of connecting carriers is that where a railway company receives goods for conveyance beyond its own line (in the absence of any special contract to the contrary, and especially upon payment for the whole journey), it impliedly undertakes responsibility for the complete transit, and is therefore not discharged from its liability by handing over the goods to a second company for further conveyance, but remains liable for a loss of or injury to the goods, even though

the same may not have happened on its own line of railway. The law was so stated in the leading case of **Muschamp v. Lancaster and Preston Junction R.W. Co.** (1841), 8 M. & W. 421. This was a case of carriage of a parcel addressed to a point beyond defendants' line, but no receipt or other writing showing the conditions of carriage to destination was given. At the trial the jury were told that where a common carrier receives a parcel so addressed and does not by positive agreement limit his responsibility to a part only of the distance, that is **prima facie** evidence of an undertaking on his part to carry the parcel to its destination even though that place is beyond the limits within which the carrier professes in general to carry on his trade. This statement of the law was upheld by the Exchequer Chamber upon motion for a new trial on the ground of misdirection. This case was followed in **McGill v. G.T.R.** (1892), 19 A.R. 245. The principle of this case has been consistently followed in England: **Wilby v. West Cornwall Ry. Co.** (1858) 2 H. & N. 703. Another important case is **Bristol and Exeter Ry. Co. v. Collins** (1859), 7 H.L. Cas. 194. In that case the contract of carriage was with the Great Western R.W. Co., while the loss (destruction by fire of goods carried) occurred on the defendants' line. It was held that there was no privity between the plaintiff and defendants, and consequently no liability on the part of the defendants. Similar decisions upon the ground of want of privity are **Crawford v. G.W. Ry. Co.** (1868), 18 U.C.C.P. 510; **Richardson v. C.P.R.** (1889), 19 O.R. 369.

In the **Collins Case** the Court had to construe conditions of carriage framed apparently so as to restrict the liability of each carrier to its own line, but it was held that such was not their effect. Practically identical conditions were considered in the case of **G.T.R. v. McMillan** (1889), 16 S.C.R. 543, with the addition of a clause that the defendants should not be responsible for any loss, etc., to the goods, if such loss, etc., occurred after the goods arrived at the stations or places on their line nearest to the points or places where they were consigned to or beyond their said limits. Inasmuch as the connecting line (in this case the Canadian Pacific Railway) was, according to the true construction of the contract the line of the defendants' agents, it was held that it must be considered for the purposes of the condition as the defendants' own line. It was held, however, that the defendants' liability at the time the loss occurred was that of warehousemen only, and consequently their responsibil-

ity was reduced from that of insurers to one of bailees only, for neglect of duty.

A railway company might, the Supreme Court held in the **McMillan Case**, refuse to enter into a contract to carry beyond its own line, and sec. 246 (3) of The Railway Act, 1888, (corresponding to sec. 284 (7) of the Act of 1906), now sec. 312 (7) did not prevent it from restricting its liability for negligence as carriers or otherwise in respect to the goods to be carried after they left its own line. The decision in **Vogel v. G.T.R.**, 11 S.C.R. 612, does not govern such a contract.

After the decision in the **McMillan Case** the different railway companies appear to have remodelled their bills of lading. As stated in the judgment in **Lake Erie and Detroit Ry. Co. v. Sales** (1896), 26 S.C.R. 663, at p. 675, the initial carrier was thereby made the agent of the shipper to hand the goods to the next connecting carrier, and was not liable for any future loss or damage whatever, and among other things it was provided that "all the provisions of this contract shall apply to and for the benefit of every "carrier" to whom goods might be delivered under it as fully as to the company. This form of contract obviated the consequences of the judgment in **Bristol and Exeter R.W. Co. v. Collins** (*supra*), and the contracts were in substance severally one for the transport of the goods to their final destination for a part of the distance by one carrier and for part by another and so on, with consequent liability by each carrier for loss occurring upon its own portion of the transit, and corresponding exemption for loss occurring beyond it. As put by King, J., in **Northern Pacific Ry. Co. v. Grant** (1895), 24 S.C.R. at page 548, "under English law (differing in this respect from American law) a company receiving goods for carriage to a point beyond its line *prima facie* contracts for the entire carriage. But it may limit its responsibility to acts or defaults occurring upon its own line, and where this is done it and each carrier in succession comes under an obligation to deliver goods so received to the next carrier."

In that case the agent of the Northern Pacific Ry. Co. at Toronto having arranged with the shipper, the plaintiff, in Ontario, for a shipment of goods *via* G.T.R. and Chicago N.W. Co., in care of the Northern Pacific R.W. Co. at St. Paul, consigned to plaintiff's own order in British Columbia, and the goods having been delivered to E. at British Columbia without an order, it was held that the goods were in the care of the Northern Pacific R.W. Co.,

from St. Paul to British Columbia, and that that company were liable to the plaintiff for the value of the goods.

Another much litigated case of a through contract is **Merchants Despatch Transportation Co. v. Hately** (1886) 14 S.C.R. 572; 12 A.R. 201; 4 O.R. 723. The transportation company made by correspondence a contract with plaintiff to carry butter from London, Ontario, to Bristol, England. They issued a bill of lading signed by one Barr, describing himself as agent severally, but not jointly, for the G.W.R.W. Co., M.D.T. Co., and G.W.S.S. Co., named as carriers therein—different portions of the transit to be performed by each, and by the bill of lading if damage was caused to the goods during transit the sole liability was to be that of the company having the custody thereof at the time of such damage. A loss having occurred before the goods were handed to the G.W.S.S. Co. by the M.D.T. Co., the M.D.T. Co. were held liable upon the through contract for the damage, and even under the bill of lading they were also liable, as the loss occurred while the goods were in the custody of the defendants—M.D.T. Co.

In **Rennie v. Northern Ry. Co.** (1876), 27 U.C.C.P. 153, the defendants did not undertake to carry for the entire journey, and were consequently held not to be liable for a loss occurring by wrongful delivery at destination.

Another case of limitation of liability as carriers, or of no liability as warehousemen in the absence of negligence, is **Brodie v. Northern Ry. Co.** (1884), 6 O.R. 180, where goods were destroyed by fire after being placed in a warehouse awaiting further conveyance by the connecting carrier: See also **Richardson v. C.P.R.**, *supra*.

Even where there is no privity by contract as already explained, a connecting carrier may become liable to the owner for conversion where goods in his possession are voluntarily given by him to another without the owner's consent. See **Central Ry. Co.** (1878) 44 U.C.R. 21; **Roach v. C.P.R.**, 1 Man. Rep. 158.

consent, and an action of trover will lie: **Leslie v. Can-**

Other decisions are:—

Rogers v. G.W. Ry. Co. (1858), 16 U.C.R. 389; defendants were held not to be liable for a loss of furs occurring beyond their line, where the contract only provided for **forwarding** the goods beyond their own line.

LaPointe v. G.T.R. (1867), 26 U.C.R. 479; defendants held not liable for a loss occurring beyond their own line where the contract provided that the company would not be responsible for any loss, etc., to goods beyond their limits. See also **Fraser v. G.T.R.** (1867), 26 U.C.R. 488, a similar case.

Gordon v. G.W.R. Co. (1875), 25 U.C.C.P. 488, a case of shipment from Cincinnati at a through rate to Detroit under a contract exempting the first and connecting carriers from liability for loss by fire, it was held, the goods having been destroyed by fire, between Detroit and Thorold, on defendants' line, that there was no such exemption for the latter part of the transit, reversing a former decision in 34 U.C.R. 224.

Jeffrey v. Canada Shipping Co., M.L.R. 7 Q.B. 1. Where the carrier receives the goods and is paid freight only for carriage to the end of his own route, the fact that he undertakes to deliver them to another carrier there for further shipment does not make him responsible for the delivery of the goods at their ultimate destination.

Neil v. American Express Co., Q.R. 20 S.C. 253, 2 Can. Ry. Cas. 111. An express company is not liable for damages to goods happening on the line of a connecting carrier where the bill of lading contained a clause limiting its liability to accidents occurring on its own line.

It should be noted in connection with these cases cited that by the terms of the merchandise and bulk grain bills of lading approved by the Board, the carrier who issues the bill of lading covering shipments between points in Canada or under a joint tariff (under which the transit may extend to or from points in the United States) becomes liable for any loss, damage or injury to the shipment **throughout the entire route to destination** with the right of recovery over against the connecting carrier on whose line such loss, damage or injury was sustained. See **Hatfield & Scott v. C.P.R.**, Sup. Ct. (N.B.) 57 D.L.R. 453. By the terms of the Live Stock Bill of Lading, however, approved by the Board's Order No. 298 of 2nd June, 1920, which became effective July 1st, 1920, a different provision is made as to the liability of connecting carriers, as follows:

"Sec. 3. By this contract the carrier agrees to transport only over its own line, and acts only as agent with respect to the portion of the route beyond its own line, except as otherwise provided by law; no carrier shall be liable for damage or injury not occurring on its portion

of the through route, nor after the stock has been delivered to the next carrier, except as such liability is or may be imposed by law. Unless a different agreement is made with connecting carriers, in respect to transportation on their respective lines, the terms and conditions hereof shall apply to the transportation by each carrier on any portion of the route to destination."

There are no reported decisions upon the effect of this provision. The reason for its introduction by the Board is stated in 26 C.R.C. at p. 102 to be that "the Board's jurisdiction to impose liability on an initial carrier for default of connecting carriers in the United States or beyond the lines of the initial carrier itself having been questioned, this section was adopted making each carrier liable for its portion of the through route only and not for default of connecting carriers, 'except as such liability is or may be imposed by law.'"

Before detailing certain cases which have been decided upon the duty of carriers of animals, and the effect of the Railway Act, reference should be made to the provisions of the Criminal Code, R.S.C., 1906, cap. 146, sec. 544, appearing under the head of "Cruelty to Animals." This section regulates the carriage of cattle upon trains and boats and requires that they shall not be carried for a longer period than 28 consecutive hours without being unloaded for rest, water and feeding, for a period of at least five consecutive hours, unless it can be shewn that they have been unavoidably delayed in transit. The cars must also be cleaned out and the floor strewn with clean sand or sawdust before reloading.

By the amendment made in 1909, cap. 9, a further section 544A was added, allowing, upon the written request of the owner or person in charge of the cattle, an extension to 36 hours where the cattle are carried on cars fitted with the necessary appliances and are during such time fed and watered without being unloaded.

Turning to a consideration of the Railway Act, it will be observed that the interpretation clause, sec. 2, no longer refers in terms to animals, as did sec. 2 (v) of the Act of 1888, under the term "Traffic." By sec. 2 (33) "'traffic' means the traffic of passengers, goods and rolling stock," and by sec. 2 (10) "the expression 'goods' includes personal property of every description that may be conveyed upon the railway," etc. No doubt the term "personal property" is quite wide enough to include all animals which may be the subject of ownership, but it

might not include animals *ferae naturae*. As these are not frequently carried, the point is not likely to arise unless something were to happen to a circus train. As cattle are generally carried at the lower of alternative rates in consideration of the shipper agreeing to relieve the company from liability for damages to them while in transit, or (in certain specified instances where such liability is not entirely waived) limiting the damages to an agreed amount, the section of the Railway Act of 1888 which was most frequently considered in this connection was sec. 246, sub-sec. 3, which provided that the company should not be relieved from an action for damages for loss occurring upon its line by "any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servant." The contracts usually signed by shippers of animals are set out in full in the cases of **G.T.R. v. Vogel**, 11 S.C.R. 612; **Robertson v. G.T.R.**, 24 S.C.R. 611, **Bicknell v. G.T.R.**, 26 A.R. 431. Though sub-secs. 1 and 2 of sec. 246 have been considerably altered in the present statute, in which they appear as sec. 312, the words of sub-sec. 3 already quoted remain in the new section, so that the cases above mentioned might still be regarded as applicable were it not for the further provision in former sec. 340, sub-sec. 1, now sec. 348 (1), which enacts as follows: "No contract, condition, by-law, regulation, declaration or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall relieve the company from such liability except as hereinafter provided, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorised or approved by order or regulation of the Board."

This section has been construed in its application to contracts for the carriage of animals, in the cases of **Booth v. C.P.R.**, 5 C.R.C. 389; **Costello v. G.T.R.**, 7 O.W.R. 846; **Mercer v. C.P.R.**, 8 C.R.C. 372, and **Sutherland v. G.T.R.**, 18 O.L.R. 139. In the **Booth Case**, the opinion is expressed, though not necessary for the decision of the case, that this section does not authorise the Board to approve a contract prohibited by the terms of section 284, now 312; the question came up squarely in the **Mercer Case**, where it was held that the effect of the Act as it now stands is to give the Board power to approve any class of contract impairing, restricting or limiting the liability of the company, and that the words in section 284, now 312, sub-section (7) "subject to this Act," are in view of such action by the Board. The question is now

settled by later decisions: **Heller v. G.T.R.**, 13 C.R.C. 367, 2 D.L.R. 114, 25 O.L.R. 488; **G.T.R. v. Robinson**, 19 C.R.C. 37, 22 D.L.R. 1, (1915) A.C. 740; **C.P.R. v. Parent**, 20 C.R.C. 141, 33 D.L.R. 12, (1917) A.C. 195.

Were it not for some such enactments as those in question, any contract which a shipper of cattle might make, and which in terms relieved the carrier from liability, would no doubt be binding: **O'Rorke v. Great Western Ry. Co.**, 23 U.C.R. 427; **Hood v. G.T.R.**, 20 U.C. C.P. 361.

In the case of shipments of live stock it is usual to provide that a man shall be sent in charge of the cattle, and where it can be shown that the damage to the cattle is due to neglect or carelessness on the part of the owner or his agent who is thus in charge, the company will not be held liable: **Farr v. Great Western Ry. Co.**, 35 U.C.R. 534; so also where a man is carried by the company for the purpose of looking after the cattle while in transit, but upon the express agreement that the company shall not be liable for any accident to him, whether due to negligence or not, such a condition is binding, and the person so injured cannot recover damages sustained while in transit: **Bicknell v. G.T.R.**, 26 A.R. 431; also **Heller, Robinson and Parent cases**, *supra*.

This provision as to freedom from liability has been materially altered in the Live Stock Bill of Lading, *supra*; the Company is made liable for injuries to persons accompanying live stock where it is guilty of negligence while such persons are in the caboose or cars provided for their or the live stock's transportation, and is relieved from liability in certain other cases, see 26 C.R.C. 101.

Where an animal is delivered to a company for carriage, and is fastened by a strap furnished by the owner, which is apparently sufficient to secure him, the company is not liable: **Richardson v. North Eastern Ry.**, L.R. 7 C.P. 75, but this was decided upon the ground that in this instance the company were not common carriers of dogs; which is not the law under our Railway Act. The fact that the fastening was insecure being perfectly apparent when the company accepted a dog for carriage, it was held liable for its escape, even though the fastening was that which was furnished by the owner: **Stuart v. Crawley**, 2 Stark. 323; and as it is generally the duty of a carrier to see that an animal which it undertakes to convey is properly secured, it is liable even though its servant undertakes to secure it in the car in presence of

the owner, if it escapes and thus sustains injury, as the owner, in the absence of special knowledge upon the subject is not supposed to know how best to secure it during transportation: **Paxton v. North British, etc., Ry.**, 9 Ct. of Sess. Cas, 3rd Ser., 50; but where a horse had been fastened in the usual way in a car, but by some means struggled through an opening twenty-five inches wide and was thereby injured; it was held that as it was most improbable that it should have wriggled through such a small opening, the company could not be considered negligent, and were therefore entitled to rely upon a condition relieving them from liability: **Ralston v. Caledonian Ry. Co.**, 5 Sess. Cas. (4th Ser.), 671; so also where the owner was by the terms of his contract, to himself inspect the car into which his cattle were loaded, and the cattle during transit became alarmed and broke out, an action against the company was dismissed: **Chippendale v. Lancashire, etc., Ry. Co.**, 21 L.J.Q.B. 22. If an animal escapes or is injured because it or some of its "fellow travellers" becomes unmanageable and breaks out or kicks, this is held to be "vice inherent in the thing carried" and the carrier would be relieved from liability at common law, and apart even from the provision of any special contract: **Blower v. Great Western Ry. Co.**, L.R. 7 C.P. 655; and where a horse is injured during transit, and there is nothing to show how the accident occurred, the Court, drawing inferences of fact, may assume that the accident was due to the "vice" of the horse rather than to any negligence of the carriers: **Kendall v. London, etc. Ry. Co.**, L. R. 7 Ex. 373; **Russell v. London, etc., Ry. Co.**, 24 T.L.R. 548; see also **Nugent v. Smith**, 1 C.P.D. 423, and the following American cases: **Newby v. Chicago, etc., Ry. Co.**, 19 Mo. App. 391; **Hutchinson v. Chicago, etc., Ry. Co.**, 37 Minn. 524; **Betts v. Farmers', etc., Co.**, 21 Wis. 81; **Evans v. Fitchburg Ry. Co.**, 111 Mass. 142; **Coupland v. Housatonic Ry. Co.**, 61 Conn. 531.

3. Liability as Warehousemen.

If the contract of carriage has terminated and the goods are in the possession of the carriers as warehousemen only, the latter are not liable for loss or damage to them unless some negligence on their part can be shewn: **Ham v. McPherson**, 6 O.S. 360; **Milloy v. G.T.R. Co.**, 23 O.R. 454, 21 A.R. 404; **Walters v. C.P.R.**, 1 Terr. L.R. 88, 1 N.W.T. 17; **Lake Erie and Detroit Ry. Co. v. Sales**, 26 S. C.R. 663; **Russell Motor Co. v. C.P.R.**, 54 D.L.R. 43, 47 O. L.R. 598.

Carriers become warehousemen either (a) where notice of arrival of the goods has been given to the consignee and he has had a reasonable time to remove them: **G.T.R. Co. v. Gutman**, 3 Rev. Leg. 452; **Richardson v. C. P.R.**, 19 O.R. 369; **McKay v. Lockhart**, 4 O.S. 407.

(b) Where even though no notice is given, he knows, or ought to know, of their arrival, and does not claim them: **Bowie v. Buffalo, etc., Ry. Co.**, 7 U.C.C.P. 191; **O'Neill v. Great Western Ry. Co.**, *ibid.*, 203; **Inman v. Buffalo and Lake Huron Ry. Co.**, *ibid.*, 325; **Chapman v. Great Western Ry. Co.**, 5 Q.B.D. 278; **Bradshaw v. Irish and North Western Ry. Co.**, 7 Ir. C.L. 252; **Masson v. Merchants Bank**, Q.R. 14 S.C. 293.

(c) Where through some fault of the shipper or consignee the contract of carriage has not begun or been completed, but the goods remain in the hands of the railway: **Milloy v. G.T.R.**, *supra*.

Where by reason of a refusal on the part of the consignees to receive the goods when tendered, they are left in defendants' hands, the defendants being warehousemen are liable only for gross negligence: **G. T. R. v. Frankel**, 2 C.R.C. 155, reversing **Frankel v. G.T.R.**, *ibid.* 136. In that case cars of iron had been consigned to the consignees at Swansea. The custom was on arrival there and notification of the fact to consignees, to have the cars taken to the latter's siding. The cars in question, however, were refused at Swansea and the refusal afterwards countermanded, but in the interval the cars had been frozen in, and before delivery the price of iron had fallen. As no negligence on the defendants' part was shewn, however, the action against them was dismissed. Where notice of the arrival of goods had been given on the day they reached the station, but they were not removed, and five days later they were destroyed by fire, it was held that the notice given was sufficient, that the consignee had had a reasonable time to remove the goods, and not having done so he could not recover: **McMorrin v. C.P.R.**, 1 C.R.C. 217; see also **Mitchell v. Lancashire, etc., Ry. Co.**, L.R. 10 Q.B. 256, 263; **Bradshaw v. Irish, etc., Ry. Co.**, *supra*. If a consignee fails to take delivery of a horse, proper expenses incurred by the company in caring for it may be recovered: **Great Northern Ry. Co. v. Swaffield**, L.R. 9 Ex. 132. There is no warranty by a warehouseman of the safety of his building, and so if goods are injured by a contractor's negligence the warehouseman is not liable: **Searle v. Lav-**

erick, L.R. 9 Q.B. 122; but if a warehouseman does some unauthorised act to the goods amounting to a conversion he is liable to the owner: **Hiort v. Bott**, L.R. 9 Ex. 86; **Lilley v. Doubleday**, 51 L.J.Q.B. 310. If a railway company undertakes to store goods for reward, it would then be, not a mere gratuitous bailee as in the **Frankel Case**, but a bailee for hire and bound to take ordinary and reasonable care of the commodity entrusted to its charge: **Beal v. South Devon Ry. Co.**, 3 H. & C. 337, at p. 342, **Dunn v. Prescott Elevator Co.**, 4 O.L.R. 103; reported on an earlier appeal, 26 A.R. 389; 30 S.C.R. 620; see also **Rosenbloom v. G.T.R.**, Q.R. 16 S.C. 360.

The question whether a railway company is bound to give notice of the arrival of the goods at destination is one of some difficulty, it being more than once held that a consignee is bound to know when goods are expected and to attend at the company's premises and demand them. For a discussion of this subject see: **Richardson v. C.P.R.**, 19 O.R. 369; **Masson v. Merchants Bank**, Q.R. 14 S.C. 293; **Norway Plains v. Boston and Maine Ry. Co.**, 1 Gray (Mass.) 263; **Barker v. Brown**, 138 Mass. 340; **Berry v. West Virginia Ry. Co.**, 11 Am. & Eng. Ry. Cases (N.S.) 103, at p. 119; **Chapman v. Great Western Ry. Co.**, 5 Q.B.D. 278; **Bradshaw v. Irish, etc., Ry. Co.**, 7 Ir. R. C.L. 252; **Montreal Navigation Co. v. L'Ecuyer**, 21 Can. L.T. 249, and notes to **Allan v. Pennsylvania Ry. Co.**, 10 Am. & Eng. Ry. Cases (N.S.) 347.

The ordinary merchandise bill of lading approved by the Board, sec. 6, provides that in case of goods not removed by the party entitled to receive them within 48 hours or in the case of bonded goods within 72 hours (exclusive of legal holidays), after written notice has been sent or given, the responsibility of the carrier shall be that of warehouseman only, with provision for storage in the car, station, place of delivery or warehouse, etc.

4. Contracts Limiting Liability.

Apart from statute a carrier may by contract limit his liability even where the damage is the result of his own negligence: **Hinton v. Dibbin**, 2 Q.B. 646; **Hamilton v. G.T.R.**, 23 U.C.R. 600; **Bates v. Great Western Ry. Co.**, 24 U.C.R. 544; **Spettigue v. Great Western Ry. Co.**, 15 U.C.C.P. 315; **Dodson v. G.T.R.**, 8 N.S.R. 405; **Dixon v. Richelieu and Ontario Navigation Co.**, 15 A.R. 647, 18 S.C.R. 704, though it has been suggested that some consideration for such an exception, other than the promise

to carry, must be shewn: **Sutherland v. Great Western Ry. Co.**, 7 U.C.C.P. 409; and where a shipper accepts a bill of lading containing stipulations against the carrier's liability, he must in the absence of proof of fraud or mistake, be deemed to have read it; but that conclusion does not follow where the document is given out of the ordinary course of business and seeks to vary the terms of a prior mutual agreement: **North-West Transportation Co. v. McKenzie**, 25 S.C.R. 38. And where there is a condition that the goods are shipped at "owner's risk" or in other terms relieving the company from liability, it has been held that unless such words expressly cover loss due to the negligence of the carrier or his servants, they will not be construed so as to include such negligence, and all such conditions are construed strictly against the carrier: **Waikato v. New Zealand Shipping Co.** (1898), 1 Q.B. 645; (1899), 1 Q.B. 56. In **St. Mary's Creamery Co. v. G.T.R.**, 2 C.R.C. 122, Meredith, J., says at p. 128: "The cases have gone to an extraordinary length in excluding from a condition limiting liability, loss occasioned by the negligence of the defendants or their servants." This judgment was affirmed in 3 C.R.C. 447; and so even though goods had been accepted "at the owner's sole risk," yet it was held that defendants were liable for loss occasioned by their servants' negligence in not housing the goods or otherwise sufficiently protecting them from the weather although plaintiff knew the condition of the goods and neglected to remove them till after the injury: **Mitchell v. Lancashire, etc., Ry. Co.**, L.R. 10 Q.B. 256; and conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of the safe keeping and carriage of the goods even though caused by the negligence, carelessness or want of skill of the carriers' servants without the actual privity or fault of the carriers, do not apply to cases where the goods have been wrongfully sold or converted by the carrier: **Wilson v. Canadian Development Co.**, 33 S.C.R. 432, reversing 9 B.C.R. 82. Where consignors agreed by their own shipping bill to insure the goods, and did so, but countermanded the insurance, and a bill of lading was issued by defendants requiring plaintiffs to insure, it was held, that the defendants could not set up a breach of the condition to insure because the loss had happened through their own negligence: **St. Mary's Creamery Co. v. G.T.R.**, *supra*.

The judgment in the **St. Mary's Creamery Case** is supported by the decision given almost at the same time in **Price v. Union Lighterage Co.** (1903), 1 K.B. 750.

In this case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability **“for any loss or damage to goods which can be covered by insurance.”** The barge was sunk owing to the negligence of the servants of the barge owner and the goods were lost. It was held that the barge owner was not exempt from liability for the loss or damage caused by the negligence of his servants. Walton, J., in delivering his judgment, proceeds upon the same lines as in the **St. Mary’s Creamery Case**. He also states that the law of England, unlike the law in the United States of America (which latter, as Meredith, J., points out, has been adopted in Canada by legislation), does not forbid the carrier from exempting himself by contract from liability for the negligence of himself and his servants, but if the carrier desires so to exempt himself, it requires that he shall do so in express, plain and unambiguous terms, citing the cases already referred to by Meredith, J., also **Compania de Navigacion La Flecha v. Brauer** (1897), 168 U.S. 104. Accordingly the condition of exemption in the case is construed as meaning: **“I will use reasonable skill and care in the conveyance of goods, but I will not undertake any liability as insurer for loss or damage which can be covered by insurance with underwriters,”** and the loss being in fact caused by negligence of the lightermen, the defendant was held liable.

Where, however, a carrier in express terms provides that he shall not be responsible for his own or his servants’ negligence, such a contract is (apart from statutory restrictions) valid at common law in Ontario: **Dixon v. Richelieu and Ontario, etc., Co.**, 15 A.R. 647, 18 S.C. R. 704; and also in Quebec: **Glengoil Steamship Co. v. Pilkington**, 28 S.C.R. 146, on appeal from Q.R. 6 Q.B. 95; and where a carrier stipulates that it shall be liable for wilful misconduct only; it is not liable for mere negligence: **Knox v. Great Northern Ry. Co.** (1896), 2 Ir. R. 632, and see **Graham v. Belfast, etc., Ry. Co.** (1901), 2 Ir. R. 13.

Effect of Railway Act, 1888, section 246 (3). Probably owing to the pointed remarks of Sir William Young, of Nova Scotia, in **Dodson v. G.T.R.**, 8 N.S.R. 405, where the law was elaborately reviewed, a statute was passed in 1871, which in 1888 appeared as section 246 of 51 Vic., cap. 29 (Dom.), which, after providing for “sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time

previously thereto (the starting of the train) offered for transportation," etc., enacts by sub-sec. 3 that "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company from which action the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servant." Prior to the decision in **Grenier v. The Queen**, 6 Ex. C.R. 276, and **The Queen v. Grenier**, 30 S.C.R. 42, 2 C.R.C. 409, it was the law that this clause had the effect of annulling any contract for exemption from liability for damage to goods carried, where it could be shewn that the railway company was negligent: **Henry v. C.P.R.**, 1 Man. L.R. 210; **G.T.R. v. Vogel**, 11 S.C.R. 612; but the decision last named has been disapproved of in the case of express contracts limiting liability by the Supreme Court of Canada in **The Queen v. Grenier**, *supra*, though it is not as yet formally overruled. This case was followed and approved by the Supreme Court in **G.T.R. v. Miller**, 3 Can. Ry. Cas. 147, but in **St. Mary's Creamery Co. v. G.T.R.**, 2 C.R.C. 122, at pp. 130 and 131, Meredith, J., discusses and distinguishes the **Grenier Case** at some length, and notwithstanding the Supreme Court's apparent disapproval of the **Vogel Case**, the Court of Appeal for Ontario follows it in **St. Mary's Creamery Co. v. G.T.R.**, in appeal, 3 C.R.C. 447. The following rules for the construction of section 246 of the Act of 1888 were suggested in an article in 20 Can. L.T. pp. 1 and 25 and in a somewhat altered form are now reproduced: They should be read, however, subject to the provisions in the bill of lading approved by the Board's orders made under the authority of sec. 348, above referred to.

1. This section does not prevent a carrier from throwing the onus of proving its negligence upon the shipper: **Cobban v. C.P.R.**, 26 O.R. 732, 23 A.R. 115; **G.T.R. v. Vogel**, 11 S.C.R. 612; **Czech v. General Steam Navigation Co.**, L.R. 3, C.P. 14; and though a carrier may not by a notice stipulate that in consideration of a reduced charge, he shall not be liable for his own or his servant's negligence, yet where such a condition has been made, the owner of the goods must prove such negligence: **Drainville v. C.P.R.**, Q.R. 22 S.C. 480; but where goods shipped are missing entirely the carrier must show that it is not his fault, no matter what condition may exist: **Curran v. Midland Ry. Co.** (1896), 2 Ir. R. 183.

2. The section would not deprive a railway company of its common law defences that the damage was due to

the Act of God, the King's enemies or some vice inherent in the thing carried: **Kendall v. London, etc., Ry. Co.**, L.R. 7 Ex. 373; **Blower v. Great Western Ry. Co.**, L.R. 7 C.P. 655; **Nugent v. Smith**, 1 C.P.D. 19 and 423; **Paxton v. North British, etc., Ry. Co.**, 9 Ct. of Sess. (3rd Ser.) 50.

3. Nor as mentioned above, need a railway company assume responsibility for connecting lines, provided it clearly appears that the carrier's responsibility is limited to its own line: **Lake Erie, etc., Ry. Co. v. Sales**, 26 S.C.R. 663 and cases cited *supra*.

4. The section does not take away a railway company's defence of contributory negligence: **Bunch v. Great Western Ry. Co.**, 17 Q.B.D. 215, 13 A.C. 31; **Bate v. C.P.R.**, 14 O.R. 625, 15 A.R. 388, 18 S.C.R. 697; **Farr v. Great Western Ry. Co.**, 35 U.C.R. 534.

5. A carrier may limit beforehand, the amount of damages that may be recovered in case a loss happens through its negligence: **Robertson v. G.T.R.**, 24 O.R. 75, 21 A.R. 204, 24 S.C.R. 611; but the agreement limiting the liability must be made before shipment: **Abrams v. Milwaukee Ry. Co.**, 61 Am. and Eng. Ry. Cas. 313. A contract for insurance of the goods by the shipper is a contract for complete exemption from liability and not a contract limiting the damages recoverable and a breach of such a contract by the shipper would not relieve the carrier from the consequences of its own negligence: **St. Mary's Creamery Co. v. G.T.R.**, 3 C.R.C. 447.

6. Agreements providing for the performance by the shipper or consignee of certain conditions precedent to the issue of the writ may be valid even where there is negligence. An instance of this occurs where notice of loss or damage must by the terms of the contract be given by the claimants within a prescribed time: **Lake Erie and Detroit Ry. Co. v. Sales**, 26 S.C.R. 663; **McMillan v. G.T.R.**, 16 S.C.R. at pp. 559 and 560; **Mason v. G.T.R.**, 37 U.C.R. 163; **Moore v. Harris**, L.R. 1 A.C. 318; **Gelinas v. C.P.R.**, Q.R. 11 S.C. 253; **St. Louis Ry. Co. v. Hurst**, 55 S.W.R. 215. Where there is no statute preventing recovery the consignor must comply strictly with such a term as a condition precedent to recovery against an express company for failure to deliver a parcel to the consignee: **Martin v. Northern Pacific Express Co.**, 10 Man. L.R. 595; **Northern Pacific Express Co. v. Martin**, 26 S.C.R. 135, see **Union Steamship Co. v. Drysdale**, 8 B.C.R. 228, 32 S.C.R. 379.

7. If it can be shewn that the negligence relied upon by the plaintiff is not within the scope of the section, a condition aptly worded may be a defence even against such negligence: 20 Can. L.T. 8 and 31, *et seq.*; **Scarlett v. Great Western Ry. Co.**, 41 U.C.R. 211; and see remarks of Patterson, J.A., in **McMillan v. G.T.R.**, 15 A.R. at p. 18. Thus where an accident happened owing to the faulty construction of the roadbed and there was an agreement limiting liability for negligence, it was held that the section then in force, similar to that quoted, applied only to negligence in the management of trains and handling of goods, and, therefore, the statute did not annul the contract. It was so decided in **Bate v. C.P.R.**, 14 O.R. 625, reversed in the Supreme Court on a question of fact, but without dissent from the principle quoted: 15 A.R. 388, 18 S.C.R. 697; and thus, where a person travels on a free pass he is not a passenger within the section, and cannot recover for damages resulting from a railway's negligence where he has agreed to assume all risks: **Bicknell v. G.T.R.**, 26 A.R. 431; **The Stella** (1900), P. 161; **Nightingale v. Union Colliery Co.**, 2 C.R.C. 47, 35 S.C.R. 65, and see **Central Vermont Ry. Co. v. Franchere**, 35 S.C.R. 68, *per* Nesbitt, J., at pp. 73 and 74; but the contrary is the rule in the United States: **New York Central Ry. Co. v. Lockwood**, 17 Wall. 357. Nor does the section apply where the railway has ceased to be a carrier and has become a warehouseman, even though negligence is proved, provided there is an agreement relieving it from liability: **Walters v. C.P.R.**, 1 Terr. L.R. 88.

8. Where any condition or contract is relied upon as a defence to an action for loss or damage to goods it is necessary that the contract should actually have come into operation: **Whitman v. Western Counties R.W. Co.**, 17 N.S.R. 405, and that the railway should be acting in performance of that very contract: **Mallett v. Great Eastern R.W. Co.** (1899), 1 Q.B. 309, and see **Armstrong v. Michigan Central Ry. Co.**, 1 O.W.R. 714.

9. As stated by Meredith, J., in the **St. Mary's Creamery Case**, 2 C.R.C. 122, there is no law in Canada under the Dominion Railway Act requiring that conditions in bills of lading shall be just and reasonable. The English Railways and Canal Traffic Act, 17 and 18 Vict., cap 3, sec. 7, in which this provision appears, has never been enacted in Canada; see **Burdett v. C.P.R.**, 10 Man. L.R. 5.

10. The statute has no operation outside Canada, and, therefore, where an accident happened in the United States, a contract limiting liability applied and furnished a defence to the railway company: **Macdonald v. G.T.R.**, 31 O.R. 663.

As already pointed out these rules should be considered as subject to the provisions of the Bills of Lading approved by the Board, impairing, restricting or limiting, under the authority of section 348, the liability of a railway company in respect of the carriage of traffic, in several important particulars, *e.g.*, Limitation of Liability: Section 4 provides that the amount of any loss or damage for which the carrier is liable, shall be computed on the basis of the value of the goods at the time and place of shipment, including the freight and duty if paid, whether or not such loss or damage occurs from negligence. This clause has been construed by the Supreme Court of Canada in **Montreal Cotton, etc. Co. v. Canada Steamship Lines**, 55 D.L.R. 634, 60 S.C.R. 442, as meaning the market value of the goods at the place nearest to the place of shipment and not the cost price of the goods to the owner at the place where he bought them, plus the charges for freight.

Notice of Claim for Loss. By section 4 this must be made in writing to the carrier at the point of delivery or origin within four months after delivery, if delivery be not made then within four months after a reasonable time for delivery has elapsed. Unless notice is so given, the carrier shall not be liable. In the case of live stock the bill of lading provides that notice of claim for injury must be made within thirty days after delivery of the live stock or, in case of non-delivery, then within thirty days after a reasonable time for delivery has elapsed. The provision for giving notice of arrival and the carrier's liability as warehouseman thereafter in section 6 has been given, *supra*.

Statements in Shipping Bill as Evidence. Though a condition exempting from liability for damages on a connecting line is valid, yet the original carrier must show that the accident happened off his line if he would succeed: **Mahony v. Waterford, etc., Ry. Co.** (1900), 2 Ir. R. 273, and see **Logan v. Highland Ry. Co.**, 2 Ct. of Sess. (5th ser.) 292, and in the absence of proof that the accident happened on the connecting carrier's line, the latter is not liable: **Tuohy v. Great Southern, etc., Ry. Co.** (1898), 2 Ir. R. 789. Where a bill of lading given

by defendants stated the number of pieces of lumber received and their superficial feet and delivery was not in accordance with the receipt, it was held in an action to recover freight for the lumber not delivered that the bill of lading was conclusive as to the number and quantity of the lumber received: **Mediterranean, etc. Co. v. Mackay** (1903), 1 K.B. 297, but a statement in a shipping bill shown to be inaccurate would not operate as an estoppel: **Lohden v. Calder**, 14 Times L.R. 311. Where through the fault of the carrier goods have been incorrectly way-billed the carrier will be liable for failure to deliver: **Bell v. Windsor, etc., Ry. Co.**, 24 N.S.R. 521.

Changes Effected by the Act. The words of sub-section 3 of section 246 of the Act of 1888 remain in section 284, sub-section (7) of the revision of 1906, now section 312, but are qualified by the words "subject to this Act" and section 348, *infra*, is new having appeared for the first time as section 275, sub-section 1 of the Act of 1903. These changes have been considered in several cases in which there was at first some diversity of opinion upon the question as to whether or not section 348 authorised the Board to approve a contract restricting the liability of a railway company for negligence in the carriage of traffic.

But the principle is now firmly established in favor of the jurisdiction of the Board by the decisions of the Judicial Committee in the **Robinson** and **Parent** cases, *supra*, at page 524.

5. Who May Sue for Failure to Carry Properly.

In the absence of special circumstances, the carrier's contract to carry goods is with the person in whom the property in the goods is vested and so where goods are delivered to a carrier for a purchaser under a binding contract of purchase, the consignee is the proper person to sue the carrier whether he has nominated him or not: **Dutton v. Solomonson**, 3 B. & P. 582; **Finn v. Western Railroad Corporation**, 112 Mass. 524, and the consignor is deemed to be the agent of the consignee to retain the carrier: **King v. Meredith**, 2 Camp. 639; **Brown v. Hodgson**, *ibid.*, 36; **London, etc., Ry. Co. v. Bartlett**, 7 H. & N. 400; but this general rule may be varied by a special contract with the consignor that the carrier will be liable only to him: **Moore v. Wilson**, 1 T.R. 659, and see **Great Western Ry. Co. v. Bagge**, 15 Q.B.D. 625. If the contract has been made

with A. it is no answer to an action by him that the compensation for the loss has been paid to B. who delivered the goods to the company: **Coombs v. Bristol, etc., Ry. Co.**, 3 H. & N. 1. Where goods are delivered to the carrier for transport to a certain place for the consignee whose name is given, the inference being that the latter is the owner, he may change the place of destination of the goods: **London, etc., Ry. Co. v. Bartlett**, 7 H. & N. 400. Where the property in goods was not to pass to the consignee until they were delivered to him in Toronto, the consignor was held to be the proper person to sue: **Steele v. G.T.R.**, 31 U.C.C.P. 260. It is so also where there is no binding contract of sale sufficient to satisfy the Statute of Frauds even though the consignee may have nominated the carrier: **Coats v. Chaplin**, 3 Q.B. 483; **Coombs v. Bristol, etc., Ry. Co.**, 3 H. & N. 510; or where the goods are sent on approval; **Swain v. Shepperd**, 1 M. & Rob. 223. A bailee of goods forwarding them by a carrier may maintain an action against the latter as he has a special property in them: **Freeman v. Birch**, 1 Nev. & M. 420, 3 Q.B. 492, n.

See the Bills of Lading Act, R.S.C., c. 118, sec. 4; the Mercantile Law Amendment Act, R.S.O., 1914, c. 133; and corresponding statutes in other provinces.

Corn was assigned to the Bank of Montreal or their assigns, the Bank assigned it to plaintiff who sued for non-delivery and it was held that he might recover as there was no plea denying his property in the corn and he was admitted to be the owner at the time it was shipped: **Kyle v. Buffalo, etc., Ry. Co.**, 16 U.C.C.P. 76. A connecting carrier receiving goods delivered to it by another company which has entered into a contract for carriage with the shipper, cannot be sued upon that contract and is not liable under it, as there is no privity of contract between himself and the shipper: **Richardson v. C.P.R.**, 19 O.R. 369. Where a person is a common carrier and a tender of goods for carriage and of a reasonable charge therefor is proved, the consignor may sue him for a refusal to carry the goods: **Leonard v. American Express Co.**, 26 U.C.R. 533.

As already stated, in carrying passengers the liability for injury to them by negligence does not depend on express contract and a person injured while lawfully in a railway carriage through the negligence of the railway company may maintain an action against the company in the absence of any contract or without relying on the contract if there be one: **Austin v. G.W. Ry. Co.**

(1867), L.R. 2 Q.B. 442; **Foulkes v. Metropolitan District Ry. Co.** (1880) 5 C.P.D. 157; **Taylor v. M.S. & L. Ry. Co.** (1895) 1 Q.B. 134; **Kelly v. Metropolitan Ry. Co.** (1895) 1 Q.B. 944 and as the liability exists irrespective of contract, it is immaterial that the injured passenger was carried free: **G.N. Ry. Co. v. Harrison** (1854), 10 Ex. 376 or that he is a Government employee carried under a statutory duty and has no contract with the company: **Collett v. L. & N.W. Ry. Co.** (1851) 16 Q.B. 984, or that he is a child for whom no ticket has been taken, his parent being under the mistaken belief that no ticket was required for him: **Austin's Case**, *supra*. In **Skinner v. L.B. & S.C. Ry. Co.** (1850), 5 Ex. 787, a benefit society had hired a train for an excursion for a fixed sum which was to be increased if more than a certain number of passengers travelled. The tickets for the journey were distributed by the treasurer of the society. It was held that the jury might properly find that the company had constituted him its agent, so that everyone who bought a ticket had a contract with the company.

In **Cooke v. Midland Ry. Co.** (1892) 57 J.P. 388, workmen's tickets were sold by the railway company to a colliery company and the latter resold them at a reduced price to the miners. It was held by the Court of Appeal that the County Court Judge might properly find that there was a contract between the company and every miner who purchased a ticket.

Stoppage in transitu is, strictly, a term descriptive of the seller's right to prevent delivery to an insolvent buyer, although the property has passed to the buyer: **Griffiths v. Perry** (1859) 28 L.J.Q.B. 204, at p. 208; **Fraser v. Witt** (1868) 7 Eq. 64 at p. 70. **Prima facie** it is the duty of the carrier to stop the goods on receipt of the consignor's instructions, without enquiring into his title to give such instructions: *Leslie's Law of Transport by Railway* at p. 58. To exercise his rights as unpaid vendor, he must have an immediate right of action for the price: **Riatt v. Mitchell** (1815) 4 Camp. 146; *Lord Ellenborough* at p. 150.

Prima facie payment by a negotiable instrument is payment conditional only on its being met at maturity. But whether the instrument was so given and accepted is a question of fact: **Goldshede v. Cottrell** (1836) 2 M. & W. 20, and it may be shewn to have been treated as absolute payment: **Lewis v. Lyster** (1835) 2 C.M. & R. 704; **Sard v. Rhodes** (1836) 1 M. & W. 153; **Sibree v. Tripp** (1846) 15 M. & W. 23. So long as the bill is outstanding

and the vendee is not insolvent, the vendor is not unpaid, and has no right of lien or stoppage in transitu, and if the vendor has negotiated the bill for value and the bill is dishonored, still he cannot exercise the rights of an unpaid vendor until he recovers possession of the bill. **In re a Debtor** (1908) 1 K.B. 344 at p. 348. But if the vendee has become insolvent, the vendor may exercise his lien or stop in transit, notwithstanding negotiation of the bill: **Gunn v. Bolckow** (1875) 10 Ch. at pp. 491, also 501-3.

Where goods are delivered to a carrier as such, the right of stoppage continues as long as the goods are in his possession as carrier: **Bethell v. Clark**, 19 Q.B.D. 553, 20 Q.B.D. 615; **Ex parte Cooper**, 11 Ch. D. 68, and in such a case, if the carrier declines to re-deliver them or delivers them to the vendee he may be liable to the vendor for their value: *Abbott on Railways*, 315; **Campbell v. Jones**, 3 L.C. Jur. 96; and where, after insolvency of the consignee and notice by the consignor to stop the goods, the carrier's agent delivered them to a third person who had passed them through the Customs, the carrier was held liable for such delivery: **Ascher v. G.T.R.**, 36 U.C.R. 609; but stoppage of goods by a Customs' officer is not a protection to the carriers unless they can show that he was properly authorised to make a seizure or to stop them: **Robson v. Buffalo, etc., Ry. Co.**, 9 U.C.C. P. 183. Where goods have arrived at their destination, but owing to some informality in the demand made by the consignee for them, they have not been delivered to him and before the carrier agrees to deliver to the consignee the goods are stopped by the consignor, the *transitus* is not at an end and the stoppage is valid: **Anderson v. Fish**, 16 O.R. 476, 17 A.R. 28; but "when the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end:" *per* Cave, J., **Bethell v. Clark**, 19 Q.B.D. at p. 561, and see **Lyons v. Hoffnung**, 15 A.C. 391. Delivery upon the purchaser's ship is equivalent to delivery to the purchaser: **Schotsmans v. Lancashire, etc., Ry. Co.**, 2 Ch. 332; but delivery to the purchaser of part of a consignment does not necessarily prevent the consignor from exercising his right to stop the rest: **Bolton v. Lancashire, etc., Ry. Co.**, L.R. 1 C.P. 431; and when the purchaser refuses to accept the goods the right of stoppage remains: *ibid.*; but if the consignee has transferred the property in the goods to a *bona fide*

purchaser for valuable consideration the right is lost: **Leask v. Scott**, 2 Q.B.D. 376. The carrier's duty on receiving a notice to stop the goods is to hold them and if there is any doubt of the vendor's right, to apply for an interpleader order, charging storage for his services as warehouseman meanwhile: **Childs v. Northern Ry. Co.**, 25 U.C.R. 165, per Draper C.J., at p. 169; and he may interplead even though he claims to exercise his lien for freight: **Cotter v. Bank of England** (1834) 2 Dowl. 728.

The vendor's right to stop the goods in transit is subject to his obligation to satisfy the carrier's lien for freight, but if the carrier re-delivers the goods to the vendor without insisting on satisfaction of his lien and the vendor refuses to pay the freight, the carrier may recover it as damages for breach of contract: **Booth Steamship Co. v. Cargo Fleet Iron Co.** (1916) 2 K.B. 570. The right of stoppage is superior to any general lien given to the carrier by contract, unless the general lien is given by a contract to which the vendor is a party, and that contract expressly prefers such lien to the right to stop in transit: **United States Steel Products v. G.W. Ry. Co.** (1916) 1 A.C. 189. The right to stop in *transitu* is a right to stop the goods in whatever state they arrive. If they arrive injured and damaged in bulk or quality the right to stop in *transitu* is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive and to claim some moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property: **Berndtson v. Strang** (1868) 3 Ch. App. 588 at p. 591. **Kemp v. Falk** (1882) 7 A.C. 573, at pp. 577-8.

The unpaid vendor may exercise his right of stoppage in *transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession or to his principal. In the latter case the notice to be effectual must be given at such time and under such circumstances, that the principal by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent delivery to the buyer. (English Sale of Goods Act, 1893, s. 46 (1).) See **Whitehead v. Anderson** (1842) 9 M. & W. 518. The notice should give a sufficient description of the goods: **Clementson v. G.T.R.**, 42 U.C.Q.B. 263. The carrier is bound to use due diligence to communicate notice of stoppage to his

servant in actual possession of the goods, whenever given, unless perhaps he can show that it was absolutely impossible to communicate it in time. If he uses due diligence and fails, he will be excused; but he cannot refuse to make the attempt on the ground that it is unlikely it will be successful: **Kemp v. Falk**, *supra*, at p. 585.

6. Measure of Damages in case of Breach of Contract of Carriage.

The measure of damages in actions for injuries to passengers has been discussed in the notes on "Negligence in operation of a railway" preceding section 298, *ante*.

As has been seen before, a company may in spite of sub-section 7 of section 312 limit the amount of damages recoverable. The damages recoverable for breach of a contract of carriage are such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it: **Hadley v. Baxendale** (1854) 9 Ex. 341, the rule is not limited to cases where goods are unduly delayed. In **Hadley v. Baxendale** it could have made no difference, in this respect, whether the crankshaft was merely delayed or absolutely lost. **Thol v. Henderson** (1881) 8 Q.B.D. 457. Where goods are shipped for a particular object not known to the carrier damages due to inability to carry out that purpose cannot be recovered: **Hadley v. Baxendale**, *supra*; **British Columbia etc., Co. v. Nettleship**, L.R. 3 C.P. 499. So in **Horne v. Midland Ry. Co.** (1873) L.R. 8 C.P. 131, a loss of boots equally with the delay would have caused the plaintiffs to lose their profits and damages, for such loss of profits must be recoverable in both events or neither. See also **Simpson v. L. & N.W. Ry. Co.** (1876) 1 Q.B.D. 274, where damages were recovered for delay in carrying wares to a show ground and it was held that the clerk of the defendants had notice of the object for which the goods were being sent: **Mancell v. Michigan Central Ry. Co.**, 19 C.R.C. 246 is a similar decision. A striking case as to the necessity of notice is **Den of Ogil Co. v. Caledonian Ry. Co.** (1902) 5 Sess. Cas. (5th Series) 99 where delay arose in delivery of a piston sent by the makers by rail to a ship which could not sail until it was fitted.

The urgency of the matter was made known to the railway company, but not the size of the ship. The Court of Session, in consequence, refused to allow the ship-owner to recover loss of profits or the whole expenses of the delay (the ship being a large one) but allowed as damages a portion of the expenses and part of the cost of the coal burned while the ship was waiting with banked fires.

Following the **Nettleship Case** it was decided in **Hamilton v. Hudson Bay Co.**, 1 B.C.R. (part 2), 176, that the expected profits on goods shipped were too remote and that where there has been loss from delay beyond the invoice or actual value of the goods, they can only be compensated by interest on such value. In **Behan v. G.T.R.**, 11 Que. L.R. (S.C.) 60, damages for loss of profits which might reasonably have been expected were allowed by the Quebec Courts; but in England loss of profits which would have been made on sales by the plaintiff's traveller were not allowed: **Great Western Ry. Co. v. Redmayne**, L.R. 1 C.P. 329; nor damages for loss of profits upon a sale made to a third person: **Horne v. Midland Ry. Co.**, L.R. 8 C.P. 131; **Thol v. Henderson**, 8 Q.B. D. 457. In **Dunn v. Bucknall** (1902), 2 K.B. 614, it was said that there is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea; although a stipulation that a railway should not be liable for damages for loss of market was upheld: **Duckham v. Great Western Ry. Co.**, 80 L.T.N.S. 774. The following decisions on this subject may also be usefully consulted. **Great Northern Ry. Co. v. Swaffield**, L.R. 9 Ex. 132. Consignee failed to take delivery of a horse; the carrier was allowed to charge the expense of keeping him: **Woodger v. Great Western Ry. Co.**, L.R. 2 C.P. 318. Hotel expenses incurred while waiting for goods that have been delayed cannot be recovered. **Hales v. London, etc., Ry. Co.**, (1866) 4 B. & S. 66. Expenses necessarily incurred in looking for goods will be allowed. **Adams v. Midland Ry. Co.** (1861), 31 L.J. Ex. 35.

But hotel expenses and loss of profits upon business while a traveller was awaiting the arrival of his sample trucks were allowed in **Chapman v. Canadian Northern R.W. Co.**, 12 O.W.R. 1035.

If the carrier breaks his contract, the other party is bound to mitigate the damages as far as may reasonably be in his power. A railway company agreed to carry the plaintiff's hay in large trucks, but carried the hay in small

trucks and failed to supply large trucks. The plaintiff sent no more hay and sold what remained at a loss. The only damages he was allowed to recover were the difference between the cost of carriage in small and large trucks: **Irvine v. M.G.W. Ry. Co.** (1879), 6 L.R. Ir. 55. In **Waller v. M.G.W. Ry. Co.** (1879), 4 L.R. Ir. 376, the defendants contracted and failed to provide horse boxes for the plaintiff's horses, which were to be sent to a sale. The plaintiff sent them by road. Owing to their soft condition the horses suffered exceptional deterioration, but the plaintiff only recovered such damages for deterioration as would have resulted from the journey if the horses had been in ordinary condition. "Travellers' goods—deliver immediately" is not a sufficient disclosure of the purpose for which the goods were sent, so that a traveller's expenses, wasted owing to the goods being delayed, can be recovered: **Candy v. Midland Ry. Co.** (1878) 38 L.T. 226. But a label attached to goods and bearing the words "Stand 23, Show Ground, Litchfield," is sufficient notice that goods are sent to be exhibited at a particular show: **Jameson v. Midland Ry. Co.** (1884) 50 L.T. 426. A carrier who loses customers by reason of the delay of another carrier employed by him to forward their goods cannot recover damages for such loss in the absence of disclosure: **Mann v. General Steam Navigation Co.** (1856) 4 W.R. 254. Other English cases are collected in Leslie's Law of Transport by Railway (1920), pp. 87, *et seq* and 424 *et seq* and a discussion upon the law in Canada will also be found in Abbott on Railways, pp. 419 *et seq*.

Demurrage.

By sub-section 8 of this section, the Board is specifically given power to deal with reciprocal demurrage whereby railways are penalized for delay in supplying cars or for delaying them in transit, or both, as shippers or consignees are penalized for holding them. On July 28, 1917, the Board postponed consideration of reciprocal demurrage until after the war, 24 C.R.C. at p. 195. Demurrage charges, as the term is generally understood in railway practice, are included within the words "toll or rate," sec. 2 (32) and are subject to control by the Board: **Duthie v. G.T.R.**, 4 C.R.C. 304; **Robinson v. C.P.R.**, 19 Man. L.R. 300, 306. They are charges made to compel the prompt loading or unloading of cars in addition to the rate or toll. Originally the word was used to express the payment for detention of a vessel beyond the normal time required for loading or unloading. Unlike freight

charges, demurrage charges are in the nature of a penalty and are imposed not for the benefit of the carrier whose property is detained from use, but in order to promote the free movement of cars in the public interest by compelling the prompt loading or unloading and release of cars for other uses or users and to relieve the track on which the cars stand while being loaded or unloaded: **Steinhardt & Kelly v. Erie Railroad Co.**, 52 I.C.C. 306.

The Average Demurrage System which forms part of the National Car Demurrage Rules in force in the United States, is not in force in Canada: **Wallaceburg Sugar Co. v. Canadian Car Service Bureau**, 8 C.R.C. 332. It has been held by the Board to be unjustly discriminatory and its adoption as part of the Canadian Car Demurrage Rules refused.

The Canadian Car Demurrage Rules (effective August 20, 1917), are printed in full in 24 C.R.C. 180 *et seq.* They apply to all cars held by or for consignors or consignees for loading or other purposes except private cars or cars held at railway terminals on through way bills awaiting trans-shipment to vessels. By Rule No. 2 notice of arrival of car and billing shall be sent or given to the consignee in writing. When the notice has been placed in the mail, the consignee is deemed to be notified at 7 a.m. following the day of mailing, even though the notice is not received by the consignee. **Ohio Iron & Metal Co. v. E. J. & E. Ry. Co.**, 34 I.C.C. 75; **Eastern Lumber Co. v. Director General, etc.**, 57 I.C.C. 272. Five days has been held to be sufficient time free from demurrage for trans-shipping grain at St. John, N.B.: **Montreal Board of Trade v. C.P.R.**, 23 C.R.C. 10. By Rule 2, the same period is allowed at Montreal and at tidewater ports for unloading lumber and hay for export. By Rule No. 5 further free time for loading or unloading may be allowed on account of weather interference: **McDiarmid et al v. G.T.R.**, 8 C.R.C. 337, or by Rule No. 6, where cars are "bunched," i.e., delivered in excess of daily orders.

The question of whether or not weather conditions are such as to prevent the employment of men in loading cars is one of fact and is not affected by shipper's diligence or lack thereof in procuring help: **Central Pennsylvania Lumber Co. v. Director General, etc.**, 53 I.C.C. 524.

The Interstate Commerce Commission has uniformly held that strikes preventing shippers from loading or unloading cars give no ground for relief against demurrage being charged: **Wholesale Coal Trade Ass'n. v. Director General, B. & O. Ry. Co.**, 58 I.C.C. 53.

By Rule No. 8 no demurrage can be collected from the consignee for any delays for which Government or railway officials may be responsible. Demurrage is not collectible when delay takes place in the Customs Department due to Government regulations. **Application Canadian Seed Co.** (April 28, 1920), File 1700,200.1). As to delay in inspection of grain by Government officials, see **Toronto Board of Trade v. Canadian Freight Ass'n.**, 22 C.R.C. 93. Demurrage cannot be collected for detention of cars due to errors of railway officials which prevent proper tender or delivery, e.g., railway agent disregarding shipper's request to make out a new bill of lading and failing to make proper correction on original bill of lading: **Southern Lumber Co. v. Director General, St. L. & S. F. Ry. Co.**, 55 I.C.C. 343, or failing properly to reconsign: **Southern Lumber & Mfg. Co. v. Central of Georgia Ry. Co. et al.**, 55 I.C.C. 227. The Board has given relief from payment of demurrage in special cases: **Re Influenza Epidemic**, File 1700, 234, Nov. 25, 1919. Demurrage may be properly charged at the rate in force when the car arrives at destination. **Security Traffic Bureau v. Canadian Freight Ass'n.**, 21 C.R.C. 57.

Demurrage is not a charge for rental of railway cars, which are transportation facilities and are not for warehouse purposes: **Canadian Freight Ass'n. v. Winnipeg Board of Trade**, 13 C.R.C. 122. As to when demurrage ceases see **Sparks v. C.P.R.**, 18 O.W.N. 300.

The primary duty of a carrier is to carry; it is not the duty of a carrier, as such, to furnish storage beyond the reasonable time necessary for unloading and removal. **Cleveland & St. Louis Ry. Co. v. Dettlebach**, 239 U.S. 588; **Southern Ry. Co. v. Prescott**, 240 U.S. 632; **American Paper & Pulp Assn. v. B. & O. Ry. Co.**, 41 I.C.C. 506 at p. 512. Demurrage cannot be charged on cars held at a reconsignment point because of an embargo at the points where diversion is ordered, unless the tariffs provide therefor. This is upon the general principle that demurrage is charged for detention for which the shipper is directly responsible and which he can abate, while an embargo is placed by reason of the carrier's disability. **The Reconsignment Case**, 47 I.C.C. 590, 634; **Wood v. New York, etc., Ry. Co.**, 53 I.C.C. 183; **Halfpenny v. Director General, etc.**, 58 I.C.C. 268. Since the **Reconsignment Case** carriers in the United States have embodied in their tariffs generally, notice that orders for diversion or reconsignment will not be accepted to embargo points.

When an unlawful toll is attempted to be charged and the consignee refuses to unload until such toll is adjusted,

demurrage cannot be charged: **Canadian Handle Mfg. Co. v. M.C.R.**, 21 C.R.C. 12. Having regard to international comity, inasmuch as contracts made in the United States for the carriage of traffic passing from one point to another in the United States through Canadian territory are under the control of the Interstate Commerce Commission, the Board has refused to make any order as to demurrage charged for delay in such traffic in Canada which would nullify a previous order of the I.C.C. on the same subject matter. **American Coal & Coke Co. v. M. C.R.**, 21 C.R.C. 15.

A complaint alleging that demurrage collected at Key West on three carloads of hay shipped in bond from Canada, through the United States to Havana, Cuba, were unjust and unreasonable and wrongfully charged, was dismissed for want of jurisdiction. **Quintal & Lynch v. Florida East Coast Ry. Co.**, 57 I.C.C. 289.

Interchange
of traffic
between
connecting
lines.

Inter-
switching.

Reciprocal
duties of
companies.

313. (1) Where a branch line of one railway joins or connects the line or lines of such railway with another, the Board may, upon application of one of the companies, or of a municipal corporation or other public body, order that the railway company which constructed such branch line shall afford all reasonable and proper facilities for the interchange, by means of such branch, of freight and live stock traffic, and the empty cars incidental thereto, between the lines of the said railway and those of the railway with which the said branch is so joined or connected, in both directions, and also between the lines of the said first mentioned railway and those of other railways connecting with the lines of the first mentioned railway and all tracks and sidings used by such first mentioned railway for the purpose of loading and unloading cars, and owned or controlled by, or connecting with the lines of the company owning or controlling the first mentioned railway, and such other tracks and sidings as the Board from time to time directs; and the company owning or controlling the secondly mentioned railway shall furnish similar reasonable and proper facilities to the first mentioned railway, and to other lines connecting with its own railway, and shall in all respects be under duties corresponding to those of the company owning or controlling the first mentioned railway,

and shall be subject in like manner to the directions of the Board.

(2) The Board may, in and by such order, or by other orders, from time to time determine as questions of fact and direct the price per car which shall be charged by and paid for such traffic.

Charge
regulated by
Board.

(3) This section shall apply whether or not the point of connection is within the same city, town or village as the point of shipment or delivery, or so near thereto that the tolls to and from such points are the same. R.S., c. 37, s. 285. Am.

Application
of section.

Former section 285. Last seven lines in first sub-section are new, some superfluous words omitted from second sub-section. See notes to section 253 where the decisions of the Board are collected.

Interswitching. The tariff of charges for interswitching services are given in the General Interswitching orders issued by the Board. See 7 C.R.C. 302, 19 *ibid.*, 376 and 24 *ibid.* 324. See notes of cases in section 312 under siding accommodation, also **Atikokan Iron Co. v. C.P.R.**, 12 *ibid.* 6.

The toll or charge for interswitching necessary to take the traffic from one line of railway to another is not included in the toll for milling-in-transit contained in the tariff. **Anchor Elevator Co. v. C.N.R. and C.P.R.**, 9 C.R.C. 175; **Taylor v. C.P.R. and Pere Marquette Ry. Co.**, 19 C.R.C. 264, 28 D.L.R. 557.

It is a well established principle that in the absence of tariff provisions to the contrary the transportation rates shown in a carrier's tariffs to a given point include delivery only on its own rails and that shippers desiring delivery on the rails of another carrier ordinarily must bear the additional reasonable switching or transfer charges incident to such delivery. **Ohio Iron & Metal Co. v. C.M. & St. P. Ry. Co.**, 28 I.C.C. 703.

A carrier is bound to have a place of delivery for traffic destined to a point to which it has quoted a tariff of tolls, free from the imposition of a switching toll on shipper or consignee. **Grain Growers, B.C., v. C.N.R.** 23 C.R.C. 169.

Generally and under this section, the obligation of carriers is limited to delivery or acceptance of carload

shipments at some reasonably convenient point of interchange, but they cannot be called upon as part of their contract of carriage to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, known as switching and spotting service. **General Electric Co. v. N.Y.C. & H.R. Ry. Co.**, 14 I.C.C. 237; **Solvay Process Co. v. D.L. & W. Ry. Co.**, *ibid.*, 246; **U.S. Cast Iron Pipe Foundry Co. v. Director General Ala. Gt. Southern Ry. Co. et al**, 57 I.C.C. 442. Whilst the failure or refusal of a carrier to perform such service on carload shipments moving between the trunk line and loading and unloading points within the limits of one industry, or make an allowance for the cost of such service performed by it, is not unreasonable, yet if the carrier performs such services for other industries without charge, or makes an allowance for the cost of such service, it subjects the first industry to undue prejudice and accords its competitors undue preference and advantage. **Pittsburgh Glass Co. v. Director General & Pennsylvania Ry. Co.**, 58 I.C.C. 84.

In **N.Y.C. & H.R.R.R. Co. v. General Electric Co.**, *supra*, the court said:

"Spotting" cars upon short and direct sidings is a service that has little kinship to these intricate manoeuvres designed not to reach an industry, but to promote the convenient distribution of wares among the subdivisions of an industry. The difference may be one of degree, but here, as so often in the law, such differences are vital.

"A railroad's duty to carry is a duty to carry over its right of way. Private sidings, owned and maintained by shippers, do not constitute the right of way, and the use that the carrier may be compelled to make of them is subordinate and incidental to the fulfilment of its primary function of carriage along its route. Reasonable delivery may involve trifling departures from the route, as where the carrier's engines, after switching cars upon a siding, move them a short distance to the doors or platforms of a factory. Industrial spurs, within the switching limits designated by the carrier, are to be regarded, indeed, for many purposes, as an extension of the terminals. **Los Angeles Switching Case**, 234 U.S. 294. But reasonable delivery does not involve the carrier's co-operation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. Conflict between engines on the standard tracks and those on the narrow tracks must be

avoided. Engines hauling cars for loading or unloading must not collide with engines hauling cars for other and unrelated purposes. The coming and going of cars must be accommodated, not to the exigencies of railroad operations, but to the centralized administration of all the parts of a vast and interdependent industry."

Where the effect of ordering an interchange track will be to sub-divide traffic, diverting it from the older line, the whole cost of construction and maintenance is placed upon the junior line. **G.T. P. Ry. Co. v. C.P.R.**, 21 C.R.C. 187.

Equality as to Tolls and Facilities.

314. (1) All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars or conveyances, passing over the same line or route, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

Equal tolls
to be
charged.

(2) No reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular person or company travelling upon or using the railway.

No discrim-
ination.

(3) The tolls for carload quantities or longer distances, may be proportionately less than the tolls for less than carload quantities, or shorter distances, if such tolls are, under substantially similar circumstances, charged equally to all persons.

Carload
quantities.

(4) No toll shall be charged which unjustly discriminates between different localities.

Localities.

(5) The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll.

Duty of
Board.

(6) The Board may declare that any places are competitive points within the meaning of this Act. **R.S., c. 37, s. 315.** Am.

Competitive
points.

Former section 315, amended. In the first sub-section the words "line or route" have been substituted for "portion of the line of railway" and in the third sub-section "carload" has been substituted for "larger" and "greater number" has been omitted before the words "or shorter distances" with similar changes in the context. In the fifth sub-section the words "or route" have been added after "line." This section is based on section 90 Railway Clauses Consolidation Act, 1845, 8 Vict., Ch. 20. The change noted above in sub-sec. 3 of "carload quantities" makes it clear that in Canada the carload is taken as the highest unit of quantity, the same rule prevails in the United States. See **Carr v. Northern Pacific Ry. Co.** and **St. David's Sand Co. v. G.T.R. and M.C.R.** and other cases cited, *infra*.

"Substantially similar circumstances and conditions." (Sub-secs. 1 and 5). This phrase has been adopted instead of "same conditions" in the English Act. The corresponding section (2) of the Act to Regulate Commerce, 1887, Chap. 104, 24 U.S. Statutes at Large, 379 (I.C. Act).

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, or the transmission of intelligence subject to the provisions of this Act, than it charges, demands, collects, or receives, from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, or message **under substantially similar circumstances and conditions**, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"Our Act" (section 252, now section 314) "leaves it open to consider in reference to the making of charges all circumstances and conditions that appear applicable, whether directly relating to the carriage or service given by the railway company or not." **Brant Milling Co. v. Grand Trunk Ry.**, 4 C.R.C. 259. In that case the continuance of an allowance made by the railway company to the owner of a mill for the cost of cartage of flour shipped from his mill by the company's railway was refused. See also **Manufacturers Coal Rates Case**, 3 C. R.C. 438. In **Crow's Nest Pass Coal Co. v. C.P.R.**, 8 C.R.

C. 33, a reduced rate of not more than six-tenths of the ordinary tariff rates on all plant shipped by the coal company over the lines of the railway company was agreed to be given for a valuable consideration; this was held to be unjust discrimination against other persons and corporations in the same district. Such circumstances and conditions must be traffic circumstances and traffic conditions not circumstances and conditions created by contract. **Regina Toll Case**, 11 *ibid.* 380, 13 *ibid.* 203. See also **Re Increase in Passenger and Freight Tolls**, 22 C.R.C. 49; **C.P.R. & Spanish River, etc., v. Algoma Eastern Ry. Co.**, 22 C.R.C. 381. Under certain conditions rates to a point on a branch line or lateral line may be higher than to points on the main line, although at a less distance from the junction point, but such rates must not be unreasonable or disproportionately higher than to nearer points on the main line. **Almonte Knitting Co. v. C.P.R. and M.C.R.**, 3 C.R.C. 441, followed in **Canadian Portland etc., Co. v. G.T.R. and Bay of Quinte Ry. Co.**, 9 *ibid.* 209; **Fredericton Board of Trade v. C.P.R.**, 17 C.R.C. 439, 21 D.L.R. 790. **Hunting-Merritt Lumber Co. v. C.P.R. and B.C. Electric Ry. Cos.**, 20 C.R.C. 181.

The mere fact that westbound rates from Winnipeg or any other point to an interior western point are less than the rates formed by a combination of the rates from such eastern points to a Pacific point, and from the latter to the interior points, does not in itself constitute unjust discrimination or undue preference. **British Columbia Pacific Coast Cities v. C.P.R.**, 7 C.R.C. 125; followed in **Attorney General, B.C., v. C.P.R.**, 8 *ibid.* 346; **Regina Board of Trade v. C.P.R., etc.**, 11 *ibid.* 380; **Canadian Oil, etc. v. G.T.R.**, 12 *ibid.* 350; **Re Increase in Freight and Passenger Tolls**, 22 *ibid.* 49. A claim of unjust discrimination between tolls charged for delivery of freight at different points, some of which have and others have not, further railway communication before final delivery is made, cannot be supported where the same circumstances and conditions do not and cannot exist. **Kelowna Board of Trade v. C.P.R.**, 15 *ibid.* 441.

It is unjust discrimination to make an extra charge for switching from a siding $2\frac{1}{2}$ miles from a station, where at a large number of places in Ontario, under more or less similar circumstances and conditions, no extra charge is made for switching from sidings located between stations. **Christie Henderson & Co. v. G.T.R.**, 9 *ibid.* 502; **Pilon v. G.T.R.**, 16 *ibid.* 433; **Hepworth, etc. Brick Co. v. G.T.R.**, 18 *ibid.* 9.

Many of the sections in this portion of the Act relating to facilities for traffic, tolls and tariffs, and the Interstate Commerce Act, are drawn largely from the corresponding sections of the English Acts, Railway Canal & Traffic Act, 1854, Regulation of Railways Act, 1893 and 1888, but these sections have since been largely amended and enlarged. In many cases the English and American decisions are of value, but in each case regard should be paid to the relevant sections of the Statute upon which the decision is based apart from the general principles applicable to the case.

The Supreme Court of the United States has repeatedly recognised that the construction of these statutes by the English Courts of Law will be considered as silently incorporated into the Interstate Commerce Act, or received with all the weight of authority.

McDonald v. Hovey, 110 U.S. 619; **Texas & Pacific Ry. Co. v. I.C.C.**, 162 U.S. 197; **I.C.C. v. Alabama Midland Ry. Co.**, 168 U.S. 144 .

But other sections are dissimilar, and the methods of trade and transportation on this continent are different from those prevailing in England. **Trammell v. Clyde S.S. Co.**, 4 I.C.R. 121. 5 I.C.C. 324.

"The charge must be the same to all for the same services performed in the same manner, for carrying goods for the same distance, and for similar services rendered in any other way."

London & N.W. R.W. Co. v. Evershed (1878), 3 App. Cas. 1029, 1036.

What constitutes differences in circumstances and conditions justifying an inequality of charge are those "relating to the carriage of the goods," to the nature and character of the service rendered by the carrier, and not to the business motives either of the shipper or carrier. It does not refer to whom the shipper may be, whether a competitor, friendly or unfriendly to the interests of the railway company.

Great Western R.W. Co. v. Sutton (1869), L.R. 4 H.L. 226; **Denaby Main Colliery Co. v. Manchester, S. & L. Ry. Co.**, 11 App. Cas. 97.

Nor is the fact that one shipper "can go by another route, and probably will do so, if charged as much as the

charge made to the complaining party, a circumstance justifying an unequal charge": **Evershed's Case, supra; Wight v. United States** (1897), 167 U.S. 512.

Nor that the railway company is seeking to develop a new trade or open up new markets: **Denaby Main Co.'s Case, supra; Union Pacific Ry. Co. v. Goodridge**, 149 U.S. 680.

Nor that the shipper contracts to give all his shipments to the carrier favoring him: **Baxendale v. Great Western Ry. Co.**, 5 C.B.N.S. 309.

A difference in the cost of service is a proper ground for a difference in the tolls or charges; in other words, it constitutes a real difference in "circumstances and conditions;" **Denaby Main Co.'s Case, supra.**

See also **I.C.C. v. B. & O. Ry. Co.**, 145 U.S. 263.

But the differences in charges must not be so disproportionate to the difference in cost as to be unreasonable; **ibid.**

"**Carload quantities,**" sub-sec. 3. The Interstate Commerce Commission have held that carriers might properly make a difference in their rates between carloads and less than carload shipments, but such differences must be reasonable, and must not be so wide as to be destructive of competition between large and small dealers.

Thurber v. New York Central, etc., Ry. Co., 2 I.C.R. 742. 3 I.C.C. 473;

On account of the phenomenal differences in expense of service rendered, the exceptionally high rates on oil in barrels less than carload lots, as compared with oil in carload lots was sustained, with a warning against the tendency to make excessive differences in favor of all shipments in carload lots as against shipments of similar articles in less than carload lots.

Scofield v. L.S., etc., Ry. Co., 2 I.C.R. 67. 2 I.C.C. 90. The principle should not be extended as its further application would handicap the smaller dealer in competition with the larger: **Imperial Oil Co. v. Can. Freight**, 20 C.R.C. 171.

Differences between carload and less than carload rates from Chicago, St. Louis, and points in the Middle West to Pacific Coast territory, averaging about 50 cents

per 100 pounds, were held not unreasonable, but a greater difference, and at the same time more than 50 per cent. of the carload rate, is **prima facie** excessive.

Business Men's League of St. Louis v. Atchison T. & S. F. Ry. Co., 9 I.C.C. 318.

In the **Tower Oiled Clothing Company's Case**, 3 C.R. C. 417, the Board referred to the difference between carload and less than carload ratings as authorised generally in all the classifications, and operating in favor of the larger and against the smaller shippers; this form of discrimination, has not been regarded as unjust discrimination, has become firmly established by custom, and has been tacitly acquiesced in by the different Railway Commissions. The I.C. Commission has decided that different rates may be charged on carload and less than carload shipments, where the difference is not too great, but a still lower rate for shipment of a hundred or a thousand carloads, though duly published and impartially applied, would be wholly indefensible.

Carr v. Northern Pacific Ry. Co. (1901) 9 I.C.C. p. 14. The fact that certain traffic is hauled in train-load lots while complainant's traffic moves in carloads can not be made the basis of a difference in rates. **Rickards v. A.C. L. Ry. Co.**, 23 I.C.C. 239; **St. David's Sand Co. v. G.T.R. & M.C.R.**, 17 C.R.C. 279

So also it has been decided that to charge different rates on carload and on cargo or train load shipments of grain, whether carried for export or for domestic use, violates the rule of equality, and tends to defeat its just and wholesome purpose: **Paine Bros. & Co. v. Lehigh Valley Ry. Co.** (1897), 7 I.C.C. 218.

So an offer of discount or rebate of rates based on a 30,000 ton limit is an unreasonable and unlawful limitation, because necessarily resulting in unjust discrimination. It cannot be supported on the consideration of quantity on the analogy usually made in ordinary business transactions between wholesale and retail dealers. **Providence Coal Co. v. Providence & Worcester Ry. Co.**, I.C.R. 363. 1 I.C.C. 107. Approved in the **Party Rate Case** by Supreme Court, **I.C.C. v. Baltimore & Ohio Ry. Co.**, 145 U.S. 263.

In the "**Packed Parcels Case**," **Great Western Ry. Co. v. Sutton**, *supra*, the carrier was held not entitled under the "equality clause" to impose a higher rate on property tendered by an intercepting or forwarding agent than

when offered by the owner. In **Lundquist v. G.T.R.**, 121 Fed. Rep. 915, it was held that the carrier may distinguish between the forwarding agent and the owner of the property, and may apply the carload rating when the goods are tendered for shipment by the owner, and refuse it when the like traffic is offered by the forwarder, who combined less than carload shipments of different owners into carload lots thereby securing the carload rate. This decision was not followed by the I.C. Commission in **California Commercial Association v. Wells, Fargo & Co.**, 14 I.C.C. 422, where the defendants' rule against bulked shipments was disapproved, nor by the Supreme Court of the United States in **I.C.C. v. D.L. & W. Ry. Co.**, 220 U.S. 235.

Long and short haul Provision, Sub-sec. 5. It is not a violation of this sub-section to charge more in one direction on certain trains than is charged in the other direction on all trains between the same points: **Hewins v. New York New Haven, etc., Co.**, 10 I.C.C. 221;; following **Cleveland C.C., etc., Ry. Co. v. Illinois**, 177 U.S. 514.

Proportionately lower fares may be charged for long distances than for shorter: **Attorney-General v. Birmingham & Derby Junction Ry. Co.**, 2 Ry. Cas. 124.

Thus a less charge to through passengers between Edinburgh and Glasgow than to passengers on the same train between Motherwell (an intermediate point) and Edinburgh, is not in violation of the equality clause: **Hozier v. Caledonian Ry. Co.**, 1 Ry. & C. Tr. Cas. 27.

The service rendered by a railway company in transporting a local passenger between two points is not identical with the service rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line: **Union Pacific Ry. Co. v. U.S.**, 117 U.S. 355.

There is no necessary connection or relation between the rates on traffic of the same kind or class transported between the same points in **opposite directions** over the same line or road; the fact that such rate in one direction is materially higher than that in the opposite direction does not, as in the case of hauls over the same line in the same direction, establish **prima facie** the unreasonableness of the higher rate. This is especially true where the hauls are of great length. **Duncan v. Atchison, etc., Ry. Co., et al.** (1893), 6 I.C.C. 85. See also **MacLoon v. Boston & Maine Ry. Co., et al.**, 9 I.C.C. 642. In that

case the fare charged to a passenger from Boston, Mass., to Janesville, Wisconsin, was \$2 greater than the fare paid in the opposite direction. Held that this was not unjust discrimination, and did not **of itself** render the higher fare unreasonable.

Without infringing this sub-section, a "party-rate ticket" may be issued at a rate less than that charged to one individual for like transportation on the same trip: **I.C.C. v. Baltimore & Ohio Ry. Co.**, 145 U.S. 263.

Granting free passes or reduced rates falls within the prohibition in this sub-section; **Re Boston & Maine Ry. Co.**, 3 I.C.C. 717.

In **Taylor v. Metropolitan Ry. Co.** (1906), 2 K.B. 55, an inequality of charges was alleged, and a claim made for repayment of the excess between the rate charged to the plaintiff and a published through rate. It was held that the plaintiff must show that another person's goods of the same description were actually carried at the published rate; and that money paid to an innocent agent who settled with his principal before any notice of the overcharge, cannot be recovered back.

A comparison with rates in other and distant parts of the country where different physical, competitive and traffic conditions exist is insufficient. **Dallas Freight Bureau v. Missouri, Kansas & Texas Ry. Co., et al.**, 12 I.C.C. 427 at p. 433.

A mere comparison of distances upon different portions of a railway is not enough to show that higher rates are charged for shorter distances over a line with small business or expensive in construction, maintenance and operation as compared with one with large business or inexpensive in construction maintenance and operation. **British Columbia Pacific Coast Cities v. C.P.R.**, 7 C.R.C. 125; **Canadian Oil Co. v. G.T.R., et al.**, 12 C.R.C. 350, 14 *ibid.* 201.

The jurisdiction of the Board as to tolls concerns only their reasonableness. No matter how much the development of an industry may be in the public interest, the Board is not an arbiter of industrial or public policy, and cannot make a low toll basis independent of its reasonableness, but carriers may in their discretion install development tolls; accordingly an application for reduction of the commodity mileage rates on agricultural limestone as compared with the special commodity tolls on crushed stone was refused. **Crushed Stone, etc. Co. v. G.T.R.**,

23 C.R.C. 132. See **Provincial Stone v. G.T.R.**, 22 *ibid.* at p. 413. Competition, whether it be water competition, railroad competition or market competition, provided it produces a substantial and material effect upon traffic and rate making, may create dissimilarity of circumstances and conditions. **Dallas Freight Bureau v. Austin, etc., Ry. Co.** (1901), 9 I.C.C. 68. In case of a rate or toll exposed to water competition, the carrier has the privilege, in its own interests, to meet such competition, and reduce the toll, but it is not the shipper's privilege to demand less than reasonable tolls because of such competition, which the railway in its discretion does not choose to meet. Such "forced toll" is not the necessary measure of a reasonable rate where such competition does not exist. **Blind River Board of Trade v. G.T.R.**, 15 C.R.C. 146, following **Plain v. C.P.R.**, 9 *ibid.* 222; **Canadian Oil Cos. v. G.T.R., et al.**, 12 *ibid.* 350. See also **Dominion Sugar Co., et al., v. G.T.R. et al.**, 17 *ibid.* 231; **Nanaimo Board of Trade v. C.P.R.**, 20 *ibid.* 224; **Montreal Board of Trade v. Canadian Freight Association**, 21 *ibid.* 77; **West Virginia Pulp & Paper Co. v. C.F.R.**, 23 *ibid.* 153.

The extent to which carriers may meet water competition is within their own discretion: **Canadian Lumbermen's Association v. G.T.R., et al.**, 11 *ibid.* 344; 17 *ibid.* 102.

Upon an application for a flat toll of one cent per pound on magazines and newspapers from Vancouver to out of town dealers in competition with the Post Office Department, it was admitted that there could not be much profit to the carrier in the proposed experimental toll, and it was held that it was entirely in the carrier's discretion whether competition should be met or not, the carrier was held to have a right to a reasonable profit as well as the shipper. The Board will not direct experimental tolls to be fixed when the tolls charged are not unreasonable. **British Columbia News Co. v. Express Traffic Association**, 13 *ibid.* 176.

The Board has no jurisdiction to order express companies to carry traffic in competition with the Post Office Department: **Express Traffic Association v. Canadian Manufacturers Association**, 13 *ibid.* 169. See also **British Columbia Sugar Refining Co. v. C.P.R.**, 10 C.R.C. 169; **Graham v. Canadian Freight Association**, 22 *ibid.* 355.

The Board decided that unjust discrimination does not exist under this section, where there is actual competi-

tion at the initial and terminal points reached by the railway lines. The general scope of this section empowers the Board to recognize the existence of competition and its effects and where such competition exists it may allow a lower toll on the section of the railway where the dissimilar circumstances and conditions created by such competition exist. **Fredericton Board of Trade v. C.P.R.**, 17 *ibid.* 439, 21 D.L.R. 790. Unjust discrimination is not shewn by charging too low a toll to one market as compared with that to another, where no competition exists between them. **Guest Fish Co. v. Dominion Express Co.**, 18 C.R.C. 1; **Chatham et al. v. C.P.R.**, 22 *ibid.* 391.

The Board will not give effect to a contract fixing a toll so unreasonably low that it constitutes in effect unjust discrimination in favor of the shipper as against other shippers on the same line of railway: **Lyons Fuel & Supply Co. v. Algoma Central Ry. Co.**, 23 *ibid.* 146.

Sub-sec. 5. Under this sub-section where traffic moves under substantially similar circumstances and conditions, lower tolls to Victoria, B.C., an ocean terminal point are justified for the longer haul than for the shorter haul to Sydney, B.C., an intermediate point, where Victoria is and Sydney is not subject to competition. **Sidney Board of Trade v. Great Northern Ry. Co.**, 23 *ibid.* 173.

Pooling
prohibited.

315. No company shall, without leave therefor having been obtained from the Board, except in accordance with the provisions of this Act, directly or indirectly, pool its freights or tolls with the freights or tolls of any other railway company or common carrier, or divide its earnings or any portion thereof with any other railway company or common carrier, or enter into any contract, arrangement, agreement, or combination to effect, or which may effect, any such result. R.S., c. 37, s. 316.

Former section 316.

The qualification, "except in accordance with the provisions of this Act," refers to section 154 (q.v.).

The corresponding section 5 of the Interstate Commerce Act originally provided: "That it shall be unlawful for any common carrier, subject to the provisions of this Act, to enter into any contract, agreement, or combination with any other common carrier or carriers, for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net

proceeds of the earnings of such railroads or any portion thereof."

This section has been extensively amended, August 24, 1912, and February 28, 1920, and the I.C. Commission is authorised to approve and authorise such division of traffic or earnings when it is of the opinion that this will be in the interest of better service to the public or economy of operation and will not unduly restrain competition. The Railway Act of 1906 was amended in 1916 to provide facilities for moving grain from the Western provinces to Fort William and Port Arthur elevators or east thereof by directing joint routes to be established for movement of grain cars and apportioning the tolls between the carriers concerned. See section 318. **Re Goose Lake District Grain**, 21 C.R.C. 38.

Two methods of pooling are intended to be prohibited: First, a physical pool, which means a distribution by the carriers of freight or passengers offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon. Second, a money pool—in the language of the Act, to "divide its earnings or any portion thereof with any other railway company."

Section 5 of the Interstate Commerce Act was declaratory of the rule already existing at common law. It was aimed against the freight pools existing in the United States at the time of the passing of the Act. The leading terms of these pools were an agreement to maintain tariffs and divide earnings from traffic between the companies on an agreed basis. Lines competing for through traffic agreed to sustain rates and prevent competition, and penalties were provided for any violation of the agreement: see **Missouri Pacific R.W. Co. v. Texas Pacific R.W. Co.**, 30 Fed. Rep. 2. The leading American case on the general question of stifling competition is **Stanton v. Allen**, 5 Denio 434.

Section 5 of the Interstate Commerce Act, coupled with the provisions of the Sherman Act (2nd July, 1890), "to protect trade and commerce against unlawful restraints and monopolies," has been the subject of judicial decision by the United States Supreme Court: **United States v. Trans-Missouri Freight Association**, 166 U.S. 290; **United States v. Joint Traffic Association**, 171 U.S. 505; **Northern Securities Co. v. United States**, 193 U.S. 197.

Railroad pools are not contrary to public policy in England or in Canada. Section 154 of the Railway Act, which is similar in its terms to section 87 of the Railway Clauses Act, 1845, permits working or traffic agreements: see **Hare v. London & North Western R.W. Co.**, 2 J. & H. 480. Two companies having the same termini, may, **in order to avoid competition**, come to an agreement with reference to the traffic along existing routes on their lines, with a view to distribute such traffic, and the revenue derived from it, between the two companies. This case was followed in **Great Western R.W. Co. v. Grand Trunk R.W. Co.**, 25 U.C.R. 37, and **Campbell v. Northern R.W. Co.**, 26 Gr. 522.

Neither this section nor section 5 of the Interstate Commerce Act prohibits division of passengers among **competing roads**: so decided by Interstate Commerce Commission in **Re Transportation of Emigrants from New York** (1904), 10 I.C.C. 13.

Where "fines" or "penalties" are imposed upon the members of voluntary associations of railway and steamship companies for violation of its rules, which appear available as substitutes for payments which would be exacted under a regular pooling system, such an arrangement is a violation of the statutory prohibition: **Freight Bureau of Cincinnati Chamber of Commerce v. Cincinnati, New Orleans & T.P. R.W. Co.**, 6 I.C.R. 195.

A railroad is not prohibited from pooling with a competing pipe line: **Independent Refiners Association v. Penna. R. Co., et al.**, 4 I.C.R. at p 176. 6 I.C.R. 52.

Facilities
for traffic.

316. (1) All railway companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.

Through
traffic.

(2) Such facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and, in the case of goods shipped by car load, of the car with the goods shipped therein to and from the railway of such other company, at a through rate; and also the due and reasonable receiving,

forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates.

(3) No company shall,—

- (a) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; No undue preference.
- (b) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company; Or discrimination.
- (c) subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever; or, Or prejudice.
- (d) so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects. Allotment of freight cars.

(4) Every railway company which has or works a railway forming part of a continuous line of railway with or which intersects any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway, all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommoda-

Connecting railway to afford reasonable facilities.

tion, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf.

Facilities for
junction of
private
sidings,
branches,
etc.

(5) The reasonable facilities which every railway company is required to afford under this section, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by any such company and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

Equal
facilities to
be granted
to express
companies.

(6) Every railway company which grants any facilities for the carriage of goods by express to any incorporated express company or person, shall grant equal facilities, on equal terms and conditions, to any other incorporated express company which demands the same.

The Board has no jurisdiction to compel an express company to operate over the railway of a company operating its own express service. **Shippers by Express v. Canadian Northern Express Co.**, 14 C.R.C. 183.

An appeal as to jurisdiction against an order made under sec. 316 by the Board requiring a railway company to grant to the applicant, a hack driver, equal privileges with any other hack driver at one of its stations, for the purpose of delivering traffic there, was dismissed by the Supreme Court of Canada having regard to the special circumstances at the station in question and without casting doubt on the right of the company to take such steps as were necessary to keep order within the limits of its station grounds. **G.T.P. Ry. Co. v. Purcell**, 15 C.R.C. 314, but see **Twin City Transfer Co. v. C.P.R.**, 15 C.R.C. 323, 11 D.L.R. 744.

Agreements
to the
contrary
void.

(7) Any agreement made between any two or more companies contrary to this section shall be unlawful and null and void. R.S., c. 37, s. 317.

Former section 317.

Section 2 of the Railway and Canal Traffic Act, 1854, 17 & 18 Vic., cap. 31, is here reproduced, sub-divided into the following sub-sections:—1, 3 (a), (c), and 4.

Sub-section 2, formerly section 271 Ry. Act (1903) is taken from the enacting portion of section 25 of the Railway and Canal Traffic Act, 1888, 51 & 52 Vic., cap. 25.

Sub-section 3 (b) and (d) are the remaining portions of section 253 (1903).

Sub-section 5 was added by amendment to section 253 (1903) by 6 Edw. VII., cap. 42, sec. 2, sub-sec. 3. It is section 2 of the Railways (Private Sidings) Act, 1894, 4 Edw. VII., cap. 19, Imp.

Sub-section 6 is section 278 (1903).

Sub-section 7 is the concluding portion of sub-section 1 section 253 (1903).

Section 3 of the Interstate Commerce Act contains sub-sections 3 (a), (c) and (1).

The words in sub-section 1 "for the interchange of traffic between their respective railways" are taken from section 3 of the Interstate Commerce Act by substituting "railways" for "lines."

"According to their respective powers" does not refer to powers restricted by any private agreements with individuals: **Rishton Local Board v. L. & Y. R.W. Co.** (1893), 8 Ry. & C. Tr. Cas. 74; see also **South Eastern R.W. Co. v. Ry. Commrs. and Corporation of Hastings**, *infra*, at p. 479.

Facilities—It has been held under the English Acts of 1854 (section 2) and 1888 (section 25), *supra*, that the company may be directed to afford the facilities therein mentioned, even though structural alterations may be required; but that there is no power to order any particular works to be carried out and the facilities to be provided must be within the powers of the railway company: **South Eastern R.W. Co. v. Railway Commrs. and Corporation of Hastings**, 3 Ry. & C. Tr. Cas. 464; **Newington v. N.E. R.W. Co.**, 3 Nev. & Mac. 306, that the railway company cannot be ordered to provide accommodation which requires it to acquire additional land, which it has no immediate power to take: **Harris v. L. & S.W. R.W. Co.**, 3 Nev. & Mac. 331; **Arbroath v. Caledonian and North British R.W. Cos.**, 10 Ry. & C. Tr. Cas. 252, and that there is no jurisdiction to order stations to be built where none existed before: or to order the company to double its line: **Glamorganshire v. G.W. R.W. Co.**, 8 Ry. & C. Tr. Cas. 196; or to order a station when pulled down to be rebuilt, or to resume traffic on the railway: **Darlaston v. L. & N. W. R.W. Co.** (1894), 2 Q.B. 45 and 494, 8 Ry. & C. Tr. Cas. 216. These cases have not been followed and the powers of the Board are much greater under the

present Act to order works to be carried out under sections 185, 188, 312 and 317 (3), as will be seen by the decisions cited under these sections.

It has been decided under the English Acts of 1854 and 1888, *supra*, with regard to passenger traffic that facilities will not be ordered to be given on the complaint of an individual for his personal convenience. It is necessary to show a case of general inconvenience, and that the accommodation sought can reasonably be granted: **Barret v. Great Northern and Midland Ry. Cos.**, 1 Nev. & Mac. 38; **Innes v. L.B. & S.C. and London & S.W. Ry. Cos.**, 2 Nev. & Mac. 155.

A covered station is a reasonable accommodation which a railway company is bound to provide for the public: **Caterham v. London, Brighton & South Coast Ry. Co.**, 1 Ry. & Canal Tr. Cas. 32.

In the **Muskoka Rates Case, C.N.O.R. v. G.T.R. & C. P.R.**, 7 C.R.C. 289, an application to provide facilities for passengers going from points on respondents' lines to points on applicants' lines and the issue of tickets at through rates was refused as to competitive points; without deciding that the section applied, joint rates were established from non-competitive points to common points, followed in **Great Northern Ry. Co. v. C.N.R.**, 11 *ibid.* 424 and **C.N.R. v. G.T.R.** (North Bay Case) 20 *ibid.* 84.

A cloak-room is a reasonable facility for the receipt and safe custody of baggage, **Singer Manufacturing Co. v. L. & S. W. Ry. Co.** (1894), 1 Q.B. 833; also platforms of sufficient length, and waiting-rooms and ticket offices at stations, and accommodation for cattle; but not refreshment-rooms and covering over platforms, **however desirable for the comfort and convenience of passengers: South Eastern Ry. Co. v. Railway Commissioners and Corporation of Hastings, supra.** To demand payment for the use of water-closets at a station is not a denial of reasonable facilities within the meaning of the section: **West Ham v. Great Eastern Ry. Co.**, 9 Ry. & C. Tr. Cas. 7, 64 L.J.Q.B. 340. The provision as to **reasonable facilities** has no reference to the prices charged by the company for conveyance: **Brown v. G.W. Ry. Co.**, 3 Nev. & Mac. 523. Apart from any facilities granted by the Railway Commissioners, the company has the right to exclude from its stations all persons except those using or desirous of using the railway, and may impose on the rest of the public seeking admission any terms it thinks proper.

The jurisdiction to determine whether there is a statutory right to demand from a railway company a facility or privilege belongs to the Railway Commissioners: **Perth General Station Committee v. Ross** (1897) A.C. 479. The Board has dealt with this question in a number of cases cited under Station Accommodation in section 312 (q.v.).

The U.S. Supreme Court have held that it is the duty of a railway company to provide suitable **facilities** for receiving and delivering live stock at its stations without additional compensation other than the regular transportation charge, and the company may provide these facilities by contract with a stock yards company: **Covington Stock Yards Co. v. Keith**, 139 U.S. 128.

The company may provide such terminal facilities for the handling of live stock by making an exclusive contract with a particular stock yards company at destination. It is not required by the Interstate Commerce Act to deliver car-loads of live stock to a connecting carrier for delivery to other stock yards at the same destination. Section 3, Interstate Commerce Act, sec. 316 (3) (a), (c) and (1), imposes no obligation upon a railroad company having its own stock yards, under a lease from a stock yards company, to accept live stock for delivery at the stock yards of another railroad company in the same city or neighborhood, although there is a physical connection between the two roads: **Central Stock Yards Co. v. L. & N. Ry. Co.** (1901), 192 U.C. 568. See also **Railroad Commrs. of Kentucky v. Louisville & Nashville Ry. Co.** (1904), 10 I.C.C. 173.

Special provision is made in the Railway Act for one company procuring facilities from another or for the obtaining of facilities from such companies. By section 185 the owner of an industry or person intending to establish an industry, may procure the construction of a branch line from the railway to such industry, and the company may be ordered by the Board to construct, maintain and operate such branch line, upon such owner or person making a deposit of the probable cost thereof. By section 252 the railway lines or tracks of any company may be joined with those of any other company, with the leave of the Board, and by sections 253 and 313 where the lines or tracks of one railway are intersected or crossed by those of another or where the lines or tracks of two different railways run through the same city, town or village, the Board may, on the application of one of the companies or of a municipal corporation or other public body or person interested order a connection to

be made and traffic to be interchanged between the two railways.

The Board will not order a carrier to provide facilities for traffic such as stations or sidings in order to offset existing highway disadvantages. The Board refused to order the construction of a freight shed shelter and siding between two stations eight miles apart; **Pheasant Point Farmers v. C.P.R.**, 14 C.R.C. 13, 7 D.L.R. 887; **Kelly v. G.T.R.**, 24 C.R.C. 367.

The Board has no jurisdiction to direct a railway company having built a spur and placed cars upon it for receiving or discharging traffic, to acquire land on such spur and lease it to applicants for a coal-shed site. **Village of Forward v. Canadian Pacific Ry. Co.**, 19 C.R.C. 434.

Under this section, 2 (21) and 312, the Board has jurisdiction to order the maintenance of a dock and facilities to be provided thereat, for handling traffic of a navigation company in competition with that of the railway company owning the railway terminal and dock. **Dominion Transportation Co. v. Algoma Central, etc., Ry. Co.**, 17 C.R.C. 422, following **C.N.R. v. Robinson**, 6 C.R.C. 101, 37 Can. S.C.R. 541.

Undue Preference or Advantage—Undue Prejudice or Disadvantage. This section implies that there may be a preference; it does not make every inequality of charge an undue preference. If the circumstances so differ that the difference in charge is in exact conformity to the difference in circumstances, there would be no preference at all: **Pickering Phipps v. London & N. W. Ry. Co.**, 8 Ry. & C. Tr. Cas. 83, per Lord Herschell, at p. 95; (1892), 2 Q.B. 229. See also **Texas & Pacific Ry. Co. v. I.C.C.**, 162 U.S. at 219.

A railway company has the right, under the Railway Act, to discriminate between different points and is only required to prove itself free from unjust discrimination or undue preference.

Brampton Commutation Case, 8 C.R.C. 42, 168 followed in **Toronto and Brampton v. G.T.R.**, 11 *ibid.* 370.

Railway companies may exercise their discretion in granting commutation tolls to one place and not to another. Such difference in the treatment of different places is not necessarily unjust discrimination and in the absence of affirmative evidence of actual discrimination resulting in the positive detriment to a place to which

such tolls are refused, the Board will not interfere. **Mas-siah v. C.P.R.**, 17 *ibid.* 88.

Unjust discrimination is not a matter of tolls in the abstract; the Board is not justified in interfering without an affirmative showing that there is actual detriment resulting from the existing tolls. **Empire Flour Mills. v. M.C.R.**, 16 *ibid.* 425.

A difference in toll treatment between two points does not necessarily create an unjust discrimination where they are on different systems of railways. **Howell v. G.T.R. et al**, 17 *ibid.* 97.

For what evidence is required to establish unjust discrimination in tolls see **London Board of Trade v. Express Traffic Association**, 19 *ibid.* 420.

It is unjust discrimination, other things being equal, to charge a higher toll from one point of origin as compared with another, at practically the same distance from the same destination. **Midland Lumber Co. v. G.T.R.**, 22 C.R.C. 387. The benefit of geographical position ought to be taken into account in rates from different places to the same centre: **Newry v. Great Northern Ry. Co.**, 7 Ry. & C. Tr. Cas. 184; **Abram v. Great Central Ry. Co.**, 12 Ry. and Canal Tr. Cas. at p. 134.

It has never been considered an infringement of section 2 of the English Act of 1854, (upon which section 314 is based), that a company should charge a higher rate per ton per mile for any portion of its line over which it is more expensive to work than other portions, and where there has been a difference of rate due to that cause, such rate has never been considered a preferential rate, *ibid.*, per Sir Frederick Peel, at p. 199. **Newry v. Great Northern Ry. Co.**, *supra*.

It is no part of the duty of the Commission to equalize differences in the natural advantages of localities through the adjustment of tariff rates. **Re Transportation of Salt from Michigan to Missouri River points**, 10 I.C.C. 148.

Carriers are not required by law, and could not in justice be required, to equalize natural disadvantages, such as location, cost of production, and the like. Where, however, the same carrier serves two districts which, by their location, the character of their output, and distance from markets where their product must be disposed of, are in substantially similar circumstances and conditions, the serving carrier can not lawfully prefer one to the other in any manner whatsoever.

Black Mountain Coal Co. v. Southern Ry. Co., 15 I.C.C. 286.

In speaking of the Act to regulate commerce, the Supreme Court said in **Interstate Commerce Comm. v. Diffenbaugh**, 222 U.S. 42, 46: "The law does not attempt to equalize fortune, opportunities, or abilities." The I.C. Commission has frequently held that it is without power to equalize natural or commercial disadvantages. **Import and Domestic Rates-Clay**, 31 I.C.C., 132, 135, and cases cited. **Douglas & Co. v. Illinois Central Ry. Co.**, 31 I.C.C. 587, 595; **Empsom Packing Co. v. C.M. Ry. Co.**, 22 I.C.C. 268, 270. In **Investigation of Alleged Unreasonable Rates on Meats**, 22 I.C.C. 160, 163, it was said that "it is no part of our duty to so adjust rates that business will or will not be done at a particular point" and in **Baltimore Chamber of Commerce v. B. & O. Ry. Co.**, 22 I.C.C. 596, 603, cited with approval in **Board of Trade of Kansas City v. St. L. & S. F. Ry. Co.**, 32 I.C.C. 297, 311, it was said, "it is not within the power of this Commission to equalize economic conditions or to place one market in a position to compete on equal terms with another market as against natural advantages."

It was said in **Board of Railroad Commissioners of Kansas v. A. T. & S. F. Ry. Co.**, 22 I.C.C. 407, 410, "A narrowing market, increased cost of production, over production, and many other conditions may render an industry unprofitable, without showing the freight rate to be unreasonable, and we have repeatedly held that it was no part of our duty to so adjust rates as to enable any industry to do business at a profit, to equalize market conditions, to overcome disadvantages not arising from a violation of the Statute." **Page Milling Co. v. N. & W. Ry. Co.**, 30 I.C.C. 605, 612.

The Board's decisions have also been uniform that carriers are not required to adjust their rates (apart from questions of reasonableness) so as to equalize cost of manufacturing or production in different sections. **Imperial Rice Milling Co. v. C.P.R.**, 14 C.R.C. 375; **Hudson Bay Mining Co. v. Great Northern Ry. Co.**, 16 *ibid.* 254; **Dominion Sugar Co. v. Canadian Freight Association**, 14 *ibid.* 188; **Western Retail Lumbermen's Association v. C.P.R.**, 20 *ibid.* 155; **Hay and Still v. C.P.R. and G.T.R.**, 21 *ibid.* 43; **Dominion Millers' Association v. Canadian Freight Association**, 21 *ibid.* 83.

In considering geographical advantage as an element in rate regulation existing, rail conditions in Canada must

be recognised, for example, Wallaceburg and Montreal are practically equi-distant from Winnipeg, but Wallaceburg is not entitled to a lower rate than Montreal on account of its distance from Winnipeg over a foreign road being shorter. **Dominion Sugar Co. v. Canadian Freight Association**, *supra*.

When a carrier makes rates to two competing markets which give one a practical monopoly over the other because it can secure reshipments from the favored locality and none from the other, it goes beyond serving its fair interest, and disregards the statutory requirements (section 3, I.C. Act) sec. 316 (3) (a) of relative equality as between persons, localities, and particular descriptions of traffic. **Savannah Bureau of Freight v. Louisville & Nashville R.W. Co., et al.**, 8 I.C.C. 377.

As there may be competing localities, so there may be competing commodities, "a particular description of traffic." Sub-section 3 (a) and (c).

It has been held that the section prohibits discrimination between differently described articles which are competitive in the same market; e.g., live hogs, cattle, and the dressed products of each, are found to be competitive commodities, and are therefore entitled to relatively reasonable rates for transportation, proportioned to each other according to the respective costs of service: **Squire & Co. v. M.C., etc., Ry. Co.**, 4 I.C.C. 611.

In **Board of Trade of Chicago v. Chicago & Alton Ry. Co., et al.**, 3 I.C.R. 233, 4 I.C.C. 158, an unlawful discrimination was found to exist between the live hog and its products in favor of other markets and buyers, and against Chicago and its buyers and packers. So also in **Chicago Live Stock Exchange v. Chicago & Great Western Ry. Co., et al.**, 10 I.C.C. 428, where the charging of higher rates for transporting hogs and cattle, than for transporting live stock products to Chicago from points west, south-west and north-west, was held to be unlawful discrimination, and to give to the traffic in the products of hogs and cattle, and to shippers and localities interested in such traffic, undue and unreasonable preference and advantage.

This decision was reversed by the Supreme Court 209 U.S. 108, who held that the lower rates for packing house products did not work an undue or unreasonable preference where the higher rate on live stock had not materially affected any of the markets, prices or shipments. The Court found that the shipments of live stock

from the West to Chicago were as great in proportion to the bulk of its business as before the change of rates, and that the lower rate given to the packers was the result of competition and did not directly influence or injure shippers of live stock. The cost of carriage, the risk of injury and the larger amount which the railway companies are called upon to pay out in damages for losses may justify a higher freight rate on live stock than on dressed meats and packing house products.

The refusal of an express company (owing to the practical difficulties involved), to accept C.O.D. shipments of liquor, does not subject that traffic to undue discrimination. **Royal Brewing Co. v. Adams Express Co., et al.**, 15 I.C.C. 255.

Unlawful Discrimination Between Carriers in Interchange of Traffic.

A carrier may agree to prepay freight received from one connecting carrier, and refuse to do so for another competing connecting carrier. **Little Rock, etc., Ry. Co. v. St. Louis, etc., Ry. Co.**, 59 Fed. Rep. 400; **Oregon Short Line v. Northern Pacific Ry. Co.**, 61 Fed. Rep. 158; **Gulf etc., Ry. Co. v. Miami S.S. Co.**, 86 Fed. Rep. 407. It is not an unlawful discrimination for a carrier to receive the freight of another connecting carrier without exacting freight charges in advance, *ibid.*

A railway company cannot be ordered to give credit to a customer, and if a customer to whom credit is allowed retains a balance due as a set-off against a balance in dispute on another account, the company are justified in refusing a further ledger account without contravening section 2, Ry. & Canal Tr. Act, 1854, though granting such accommodation to other customers: **Skinningrove v. N.E. Ry. Co.**, 5 Ry. & Canal Tr. Cas. 244.

Unjust Discrimination in Distributing Freight Cars.

Where a shipper ordered cars for a certain date, the company's action in filling subsequent orders of others before the plaintiff's, was held **unlawful discrimination**: Supreme Court, Utah (1902), 66 Pac. Rep. 768. See also **Hawkins v. L.S. & M. S. and W. & L. E. Ry. Cos.**, 9 I.C.C. 207 & 212. **I.C.C. v. Ill Central Ry. Co.**, 215 U.S. 452; **Penna. Ry. Co. v. Puritan Coal Co.**, 237 U.S. 121.

In **Paxton Tie Co. v. Detroit Southern Ry. Co.**, 10 I. C.C. 422, the defendant refused to furnish the complainant with cars for shipment of cross ties, while furnishing

cars to other shippers for shipment of other freight, and supplied cars for shipment of cross ties almost entirely for its own use, held to be unjust discrimination and **reparation** ordered.

The I.C. Commission have held under section 3, I.C. Act (containing substantially the same provisions as section 316), that it has jurisdiction to deal with a case of alleged undue prejudice and disadvantage to shippers of outward package freight through the enforcement by carriers of a regulation providing for the closing of depots used for the reception of such freight earlier than at other competing distributing cities: **Cincinnati Chamber of Commerce v. Baltimore, etc., Ry. Co.** (1904), 10 I.C.C. 378.

Milling, malting, fabrication, storage and cleaning in transit are privileges accorded to shippers by carriers in the sense that the Board cannot order them, except to prevent discrimination, but they become enforceable rights when set out in the tariffs under which shipments are made. **United Grain Growers v. Canadian Freight Association** (Milling in Transit Case), 24 C.R.C. 128. Where such privileges are exercised the inbound and outbound shipments are to be treated as part of the same movement under the contract, and subject to a through rate. It is unjust discrimination to charge a higher milling-in-transit toll on the same commodity moving from different localities by different routes under similar circumstances and conditions to a common competing market: **Dominion Millers' Association v. Canadian Freight Association**, 22 C.R.C. 125, but it is not unjust discrimination to grant the privilege in favor of the U.S. milling points as against Canadian points over Canadian lines (in order to meet the toll of U.S. lines) where the Canadian milling points can enjoy a similar privilege to the same destinations by an alternative route through the United States. **Empire Flour Mills v. M.C.R.**, 16 *ibid.* 425. Shippers are not entitled to a milling in transit privilege as a matter of right. Its allowance in the public interest by carriers to shippers in one section must be without discrimination against shippers in another section served by its line. **Koch v. Penna Ry. Co.**, 10 I.C.C. 675; **Ontario and Manitoba Flour Mills v. C.P.R.**, 16 C.R.C. 430, followed, **Sudbury B. & M. Co. v. C.P.R.**, 18 *ibid.* 410; **Shingle Agency v. C.P.R.**, 21 *ibid.* 9. But see also **R.R. Com., Oregon, v. Oregon Short Line Ry. Co.**, 23 I.C.C. 151 at p. 169 and **Southern Rice Growers v. Tex. & N.O. Ry. Co.**, 53 I.C.C. 197 at p. 202, as to enlarged powers of I.C. Com. since amendments of 1906 and 1910.

There is no instance of the privilege on the by-product having been granted, apart altogether from the main product. **Sudbury Case, supra.** As to storage privilege, see **Port Arthur and Fort William v. C.P.R.**, 18 *ibid.* 406.

Rates on grain from point of re-shipment under tariffs allowing milling in transit are those effective at the time of original shipment unless the tariff clearly provides otherwise. **United Grain Growers v. Canadian Freight Association**, 24 *ibid.* 128.

It is not unjust discrimination to impose a wharfage toll on shipments from the east contracted to Fort William, delivered and stored there and subsequently shipped west and not to exact it on through shipments. **Fort William Board of Trade v. C.P.R.**, 18 C.R.C. 401.

The Board has no jurisdiction to compel railways to give equal facilities to all busmen to solicit business on station premises: **Banff Livery & Busmen v. C.P.R.**, 19 C.R.C. 425. The Board will not interfere in a dispute between railways and transfer companies as to contractual rights where no public interest is involved. **City Transfer Co. v. C.P.R.**, 19 C.R.C. 427.

Board may determine.

317. (1) The Board may determine, as questions of fact, whether or not traffic is or has been carried under substantially similar circumstances and conditions, and whether there has, in any case, been unjust discrimination, or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this Act, or whether in any case the company has, or has not, complied with the provisions of the three last preceding sections.

May make declaratory regulation.

(2) The Board may by regulation declare what shall constitute substantially similar circumstances and conditions, or unjust or unreasonable preferences, advantages, prejudices, or disadvantages within the meaning of this Act, or what shall constitute compliance or non-compliance with the provisions of the three last preceding sections.

Board may order specific works, tolls, etc.

(3) For the purposes of the last preceding section, the Board may order that specific works be constructed or carried out, or that property be acquired, or that specified tolls be charged or that cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Board, or that any specified steps, systems,

or methods be taken or followed by any particular company or companies, or by railway companies generally. R.S., c. 37, s. 318.

The principle referred to in sub-section 1, has been frequently enunciated by the highest Courts in both England and the United States, "Whether in particular instances there has been an undue or unreasonable prejudice is a question of fact." **Pickering Phipps v. L. & N. W. Ry. Co.** (1892), 2 Q.B., *per* Lord Herschell, at p. 237.

"The argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact depending on the matters proved in each case." **Palmer v. L. & S. W. Ry. Co.**, L.R. 1 C.P. 593, *per* Erle, C.J.

"They gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable; but under the circumstances is not the reasonableness a question of fact? Is not it a question of fact and not of law whether such a preference is due or undue? Unless you can point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact." *Per* Lord Herschell, in **Denaby Main Colliery Co. v. M., S. & L. Ry. Co.**, 3 Ry. & C. Tr. Cas. 426.

See also **Texas & Pacific Ry. Co. v. I.C.C.**, 162 U.S., at p. 226. **Penna Co. v. U.S.** 236 U.S., 351 at p. 361.

In **Danville v. Southern Ry. Co.**, 8 I.C.C. 409, a case arising under section 4, I.C. Act, the Commission said at p. 429:

"From the very nature of the question, however, one case can seldom be an exact precedent for another. Each traffic situation presents points of difference, and each complaint must be considered and decided upon its own peculiar facts. The facts presented in this long series of cases are kaleidoscopic. A single fact may appear a hundred times, but always with a set of different facts. The same group of facts seldom, if ever, appear again in exactly the same combination or relationship. Hence each group of facts embraced in a case, and each decision thereon, is often little more than a decision upon the facts in that particular case. Speaking generally, it has been found that no two cases are alike in every respect, and no rule can be devised by which a decision can be rendered in every case. Nevertheless, as will be seen,

there are in many of the cases cited certain common elements and underlying principles.”

The same principles are followed by the Board and the I.C. Commission in dealing with cases brought before them. The Commission, however, is not bound by any rule of **stare decisis**, its conclusions are not **res judicata**, and it is not precluded from again considering a matter once examined and decided, if a new and different set of facts is brought to its attention. Questions of reasonableness and discrimination are always questions of fact and each case must stand or fall on the record made in that case. **Curry & Whyte v. Duluth & Iron Range Ry. Co., et al.**, 30 I.C.C. 1.

In **Manitoba Dairymen's Association v. Canadian Northern and Dominion Express Cos.**, 14 C.R.C. 142, 7 D.L.R. 868, the Board held it must find its criteria of reasonableness of rates within Canada, and while appreciating the regulative work of the I.C. Commission and treating the findings of that Commission with great respect, will investigate for itself the special circumstances of all cases coming before it, followed in **Riley v. Dominion Express Co.**, 17 C.R.C. 112, **Re Telegraph Tolls**, 20 *ibid.* 1.

In discrimination cases it must be shewn not only that the discrimination alleged to exist operated to the injury of the complainants, but it must also be shown that they have been damaged and the amount thereof. **Penna Ry. Co. v. International Coal Co.**, 230 U.S. 184, **Mitchell v. do.**, *ibid.* 247. The reasonableness of a toll cannot be determined apart from the concrete conditions to which it is applicable. **Re Joint Freight and Passenger Tolls**, 10 C.R.C. 343. In the **Western Freight Rates Case**, 17 C.R.C. 123, it was held that the Railway Act does not forbid all discriminations and preferences but only forbids unjust discrimination or undue preference and whether one or the other exists in any particular case is a question of fact.

Facilities
to be
afforded for
movement of
grain from
the Western
Provinces.

318. If the company is unable or fails to provide sufficient facilities for the movement of grain from the Western Provinces to the elevators at the head of Lake Superior, or to destinations east thereof, after the close of navigation on the Great Lakes and before the next harvest, and grain in certain sections or districts cannot by reason thereof be marketed, the Board may require the said company to furnish all facilities within its powers for the

carriage of such grain in such sections or districts to any intermediate point or points of interchange with another company or any terminal elevator, and there to make delivery thereof to such other company or companies or to such elevator for carriage by such other company or companies as the Board may direct; and the Board may require such other company or companies to transport such grain and supply the necessary cars and engines therefor, and the rates lawfully published and filed by the company in default and obtaining on its route shall apply over the joint route or routes so directed and shall be apportioned between the companies as the Board may direct. 1916, c. 2, s. 1.

New section enacted in 1916. In the Goose Lake District at the end of February, 1916, sixty per cent of the crop waiting for transportation was in danger of deterioration and could not be moved by the Canadian Northern Ry. Co. quickly enough to serve the public interest. The Board made an order on March 4, 1916, under this section (1) requiring the C.N.R. to supply at once 1,200 cars and 36 locomotives to be used solely for carrying grain from this district to the terminal elevator and transfer track of the Grand Trunk Pacific Ry. Co. at Saskatoon, (2) the G.T.P. Ry. Co. (having idle cars) to use all available rolling stock in carrying grain from the elevator to eastern points and to supply the C.N. Ry. Co. with one empty box car for each car of grain received at the transfer track, (3) directing that proportionals of the through rate be fixed (without alteration) so as to give the C.N. Ry. Co. a larger share than it would receive on a mileage basis as its proportion of the through rate. **Re Goose Lake District Grain**, 21 C.R.C. 38.

319. Whenever it is shown that any railway company charges one person, company, or class of persons, or the persons in any district, lower tolls for the same or similar goods, or lower tolls for the same or similar services, than it charges to other persons, companies, or classes of persons, or to the persons in another district, or makes any difference in treatment in respect of such companies or persons, the burden of proving that such lower toll or difference in treatment does not amount to an undue preference or an unjust discrimination, shall lie on the company. R.S., c. 37, s. 77.

Discrimination.

Burden of proof.

Former section 77, and practically reproduces sec. 27, sub-sec. 1, English Railway and Canal Traffic Act,

1888, with appropriate changes in terminology used in the English and Canadian Act.

In the **Brampton Commutation Rate Case**, 11 C.R.C. 365, 370, the question was stated by the Board for the opinion of the Supreme Court, viz. Is sec. 341 of the Act (now sec. 345), controlled, modified or affected by sec. 77 (now sec. 319), or any other section of the Act, and if so, to what extent? It was held by a majority of the Court that the provisions of sec. 77 do affect the issue of commutation tickets under sec. 341. In the **Regina Toll Case** it was held that no agreement as to tolls could defeat the prohibitions and obligations imposed by sec. 77 (now 319) and 315 (now 314), see 11 C.R.C. 380, 44 Can. S.C.R. 328, 12 C.R.C. 369, 45 Can. S.C.R. 321, 13 C.R.C. 203. In **Conrad Mines v. White Pass & Yukon Ry. Co.**, 11 C.R.C. 138, the Board held that the respondent had not discharged the burden placed upon it by former sec. 77 (now 319) of proving that the rates in question did not constitute an unjust discrimination.

What Board
may consider
in deciding
undue
preference.

320. In deciding whether a lower toll, or difference in treatment, does or does not amount to an undue preference or an unjust discrimination, the Board may consider whether such lower toll, or difference in treatment, is necessary for the purpose of securing, in the interests of the public, the traffic in respect of which it is made, and whether such object cannot be attained without unduly reducing the higher tolls. R.S., c. 37, s. 319.

Former section 319, following sec. 27, Ry. & Canal Traffic Act, 1888. See section 319 as to burden of proof in case of discrimination resting upon the railway company.

In the interests of the public—meaning of. In **Liverpool Corn Traders' Association v. London and North Western Ry. Co.**, 7 Ry. & C. Tr. Cas. 126, at p. 137, Wills, J., in delivering judgment, said: "However difficult it may be in any particular case to say what is or is not in the interests of the public, the public must be a wider one than that of the two localities concerned."

In a later case, **Liverpool Corn Traders' Association v. G.W. Ry. Co.**, 8 Ry. & C. Tr. Cas. 114, (1891) 1 Q.B. 120, at p. 127, the same judge referring to the passage last quoted, said: "I think I have suggested too narrow a view of what is meant in sub-section 2 by the interests of the public. Any such misapprehension on my part must be

effectually corrected by the recent judgment in **Pickering, Phipps and Others v. London & North Western Ry. Co.**, (*infra*), from which it is clear that the public intended is the public of the locality or district affected, and that any considerable slice of the population in general as opposed to an individual or association of individuals will satisfy the description."

This expression "interests of the public," section 27, sub-section 2 of the Railway and Canal Traffic Act, 1888, includes any considerable portion of the population not being the parties or their servants, and will therefore include the inhabitants of any district dependent for its prosperity on any given industry or trade, **Castle Steam Trawlers v. G.W. Ry. Co.**, 13 Ry. & C. Tr. Cas. 145.

Referring to these decisions, Dr. S. J. McLean (now assistant Chief Commissioner) remarks: "By judicial construction 'public interest' has thus come to mean the controlling power of effective competition on particular rates." *Quarterly Journal Economics*, Vol. 20 (1905), reprinted in *Ripley Railway Problems*, p. 615.

See **Stamford Junction Case**, 3 C.R.C. 256, where the general question of "public interest" is discussed, pp. 259-261.

The legitimate desire of the railway company to secure the traffic is not only to be considered, but also whether it is in the interests of the public that they should secure it or abandon it or not attempt to secure it. One class of cases intended to be covered is where traffic from a distance is charged low rates because unless such low rates are charged it will not come into the market at all; per Lord Herschell, in **Pickering Phipps v. London & N.W. Ry. Co.** (1892), 2 Q.B. at p. 244, 8 Ry. & C. Tr. Cas, at p. 102.

The fact that a trader has access to a competing route for the carriage of his goods may be taken into consideration by the Commissioners in deciding whether lower tolls or rates charged to such trader constitute an undue preference, *ibid*.

See also **Fairweather v. Corporation of York**, 11 Ry. & C. Tr. Cas. 201, where after taking the public interest and other matters into consideration, an agreement with the corporation providing for a fixed charge to Messrs. L. for use of River Ouse navigation in conveying wheat was held an undue preference over another firm also using the river.

In **Spillers and Bakers v. Taff Vale Ry. Co.**, 12 Ry. & C. Tr. Cas. 70, and **Lancashire Patent Fuel Co. v. London & North Western Ry. Co.**, et al., *ibid.*, 77 complaints that lower rates were charged on coal for shipment than for coal carried to a trader over the same sidings were dismissed. The Board has given similar decisions.

In **Kerr v. C.P.R.**, 9 C.R.C. 207, a complaint that the rate on grain and grain products from Franklin to Winnipeg was unjustly discriminatory as compared with the rate from Franklin to Fort William, a much longer distance on the same goods for eastern markets was dismissed. It was held by the Board that the competition of other grain growing territories fixes the rate on through shipments to eastern markets.

The right of a carrier to consider the resultant traffic as a reason for a lower toll on the original commodity where hauled to points of manufacture on its own line, is well established. **Kelowna Board of Trade v. C.P.R.**, 15 C.R.C. 441. A toll of 22 cents per 100 pounds on newsprint paper from Thorold, Ont., to Chicago, Illinois, U.S. A., was not found to constitute an unjust discrimination or undue preference in favor of competitors in the Chicago market. **Ontario Paper Co. v. G.T.R.**, 24 C.R.C. 177.

Apportionment of toll for carriage by land and water.

321. In any case in which the toll charged by the company for carriage, partly by rail and partly by water, is expressed in a single sum, the Board, for the purpose of determining whether a toll charged is discriminatory or contrary in any way to the provisions of this Act, may require the company to declare forthwith to the Board, or may determine, what portion of such single sum is charged in respect of the carriage by rail. R.S., c. 37, s. 320.

Former section 320.

Freight Classification.

Tariff of tolls subject to classification by Board.

322. (1) The tariffs of tolls for freight traffic shall be subject to and governed by that classification which the Board may prescribe or authorise, and the Board shall endeavour to have such classification uniform throughout Canada, as far as may be, having due regard to all proper interests.

(2) The Board may make special regulations, terms and conditions or order or direction in connection with such classification, and as to the carriage of any particular commodity or commodities mentioned therein, as to it may seem expedient.

Special
terms and
conditions.

(3) The company may, from time to time, with the approval of the Board, and shall, when so directed by the Board, place any goods specified by the Board in any stated class, or remove them from any one class to any other, higher or lower, class: Provided that no goods shall be removed from a lower to a higher class until such notice as the Board determines has been given in the **Canada Gazette**.

Changes of
class.

(4) Any freight classification **and exception thereto** in use in the United States may, subject to any regulation, order or direction of the Board, be used by the company with respect to traffic to and from the United States. R.S., c. 37, s. 321. Am.

United States
classification.

Former section 321, the only amendment being adding the words "and exception thereto" in sub-sec. 4 after "classification" in order to conform to the practice of the I.C. Commission. It is said much of the freight in the United States is carried under such exceptions. Dr. McLean defines classification as a ready reference list of the articles of freight which a railway holds itself out to carry for the public offering traffic. See Chapter 4, Principles of Freight Classification, Inland Traffic at p. 54.

General Explanation. Classification, it has been said, is the foundation of all rate-making. It was very early found in the history of railroads that the charges for transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for if this were attempted, it would restrict within very narrow limits the commerce in articles whose bulk and weight was large as compared with their value; so the carriage of very large articles to any distance would be prevented, while the rates on the carriage of very small articles, perhaps of great value, would be absurdly low. Accordingly, it was considered not unjust to apportion the whole cost of service among all the articles transported, upon a basis that should have regard to the relative value of the service, rather than the relative cost of transportation. Such

a system of rate-making thus in principle approximates to taxation, the value of the article carried being the most important element to be considered in determining what should be paid upon it.

Accordingly, for convenience and certainty in imposing charges, freight is classified, an article which is placed in one class being charged a higher or lower proportional rate than that which is placed in another.

But value is not the only thing to be considered when classification is made. Some articles are perishable, some easily broken, some involve special risks in carriage, some are bulky, some specially difficult to handle, etc. All these considerations affect rates; and in addition, every section of the country has peculiar products it wishes to send to market as widely as possible, and expects the railway to encourage its productions by giving low classification, and thus low rates. Ist Annual Report, I.C.C. (1887) p. 30-1.

Classification Factors—How Reflected. Before considering any other factors, there should be ascertained the bearing upon classification of those factors which are definite and readily ascertainable, such as value, risk, and the relation of weight to space, which is herein called car loading. If other influences require a modification of the result, such modification may thereafter be made. The evidence indicates a lack of information on the part of the carriers as to the comparative car loading and value of the articles here concerned. Almost all the evidence introduced in this respect came from shippers. Carriers should obtain this information by systematic periodical investigation, and should reflect differences in car loading and value before making a final determination as to rate relationships.

Value is a factor in classification, for two reasons: Because carriers incur a greater risk in transporting more valuable articles and because value is generally indicative of the ability of a commodity to pay transportation charges. **Rates on Lumber and Lumber Products**, 52 I.C.C. 598, at p. 615.

The **method of classification** consists in grouping a large number of articles into several different classes, with different rates for the transportation of each class. Articles of the same kind are usually grouped together in the same class as far as possible, but as the articles in each class are very numerous, there is a great diversity

among them, and there are generally but few things of the same kind can be placed in one class. This is unavoidable, because the articles are so numerous, while the classes are but few. All articles embraced in a class are usually charged the rate of that class, whatever it may be. The method of making rates by classification is intended for the convenience of the company and also for the accommodation of the shippers. Experience has shewn that it is the best and most practical way of dealing with the subject, but it sometimes happens that there are inequalities of rates on some of the articles grouped together in one class as compared with others in that class. Where one article of freight in a class is charged a much higher or lower relative rate than it ought to be charged with, compared with another in the same or some other class, this may amount to an unjust discrimination.

In grouping articles together in a class for the purpose of fixing rates, several considerations are usually deemed to have a controlling effect. Among these may be mentioned the competitive element, or rates made necessary by competition, the bulk and weight, value, hazardous and extra hazardous freight, liability to waste or injury in transit, the facilities required for particular or special shipments, the volume of the business, that is, the tonnage movement, the direction in which the freight moves. Freight occupying a great deal of space must to some extent be charged for that space; or if it be freight of very great value, a higher rate may be charged than if it be of very little value, on account of the responsibility connected with the service, and the corresponding benefit to the owner. **Pyle v. East Tennessee V. & G. R.W. Co.**, 1 I.C.C. 465.

The reports of the Interstate Commerce Commission since its inception in 1887 show persistent efforts, by appeals to the Railway Companies and Congress, for the establishment of a uniform classification throughout the United States. Although much has been accomplished, the effort so far has failed, owing to diversity of trade and traffic conditions. For subsequent history see **Western Classification Case**, 25 I.C.C. 442 and **Consolidated Classification Case**, 54 I.C.C. 1. At present there are three principal classifications in force, official, southern and western. The Official Classification, generally speaking, is adopted by the railways in that portion of the United States north of the Ohio and Potomac Rivers, including New England and east of a line from Chicago to St. Louis and the north of the Ohio River. The Southern governs south of the official territory, and east of the

Mississippi River. The Western governs in the territory west of Lake Michigan, the Mississippi River and official territory.

There are, however, many exceptions to the application of these general classifications, in the territories above described, *e.g.*, commodity tariffs providing lower rates than the regular classification tariffs for certain staple articles such as grain, lumber, coal, iron, oil, etc., are published by nearly all the leading companies. For some purposes these territories overlap, and freight shipped over different railways may be and often is subject to different classifications as in the case of a shipment to or from a boundary of the classification territory, one classification governs throughout. For instance, St. Louis uses Official Classification Eastbound, Western, westbound and Southern, southbound. There is no necessary uniformity as between the classifications, either in rating or description.

Sub-section 4 recognises international traffic by providing that any freight classification (and exception thereto) in use in the United States may, subject to the Board's order, direction or regulation, be used in the traffic to and from the United States. The result is that international trade movements between Canada and the United States and some movements in Canada are subject to these classifications of the United States already mentioned. See **Graham v. Canadian Freight Association**, 22 C.R.C. 355.

The Canadian Classification has ten classes, in reality sixteen, including the multiples of the first class rating *e.g.*, one and one half times first class, double first class, etc. It is built up on the fifth class, fourth being 25 per cent, third 50 per cent, second 75 per cent and first 100 per cent higher than the fifth. In the first five classes the railway loads and unloads except when the goods weigh 2,000 lbs. or over, from the sixth class to the tenth class it does not unload; this is done by the shipper and consignee. The Dominion of Canada is embraced in Canadian Classification Territory with a sub-division called the Canadian Freight Association territory, including Canadian points east of but not including Port Arthur, Sault Ste. Marie, Sarnia and Windsor (*i.e.*, east of the Great Lakes). From this territory to point in the States, Oregon, Washington and the North Pacific Territories, the movement is subject to Canadian Classification. While this classification is general throughout Canada there is a minor classification known as the Northern

Classification in force on the White Pass & Yukon route, connecting Skagway and White Horse. For further information as to Canadian Freight Classification see Inland Rates by Dr. McLean, Chaps. 4 and 5.

There is a separate classification in use by Express Companies, approved by the Board, see section 360.

The U.S. Official Classification contains nominally six classes, the Western ten, and the Southern twelve. These numbers are somewhat misleading, for there are actually more classes by sub-division than those in each system. Many thousand items are embraced in these different classifications, due largely to repetitions, e.g., acids occur five times in as many different classes, depending on the method of shipment, there are classifications for articles in carloads, (C.L.), and less than carload lots, (L.C. L.). Some of these classifications are referred to in the **Tower Oiled Clothing Company's Case**, 3 C.R.C. 417.

As might readily be expected, charges of unjust discrimination between rival communities or kindred kinds of traffic are frequently found upon investigation to arise from the diverse classifications to which the same commodity is subjected in different sections of the country, and the manner in which different articles, which are in reality competitive, have been classified, e.g., live stock and its products, *supra*, p. 567; wheat and flour, **Kauffman v. Missouri Pacific Ry. Co., et al.**, 3 I.C.C. 400; corn and corn products, **Bates v. Pennsylvania Ry. Co.**, 3 I.C.C. 296; raisins and dried fruits, **Martin v. Southern Pacific Ry. Co., et al.**, 2 I.C.C. 1. Raising soap in carloads from 6th to 5th class was held not unlawful; while raising soap in less than carloads from 4th to 3rd class was held unreasonable and unjust. **Procter & Gamble v. C.H. & D. Ry. Co., et al.**, 9 I.C.C. 440. So also raising hay and straw from 6th to 5th class was held to be unjust and unreasonable, and resulting in unlawful discrimination against localities where hay and straw are produced, and against producers, shippers, dealers, and consumers of such articles in that section of the country. **National Hay Association v. L. S. & M. S. Ry. Co., et al.**, 9 I.C.C. 264.

The judgment in the **National Hay Association Case** was reversed as the Commission had no power at that time to fix rates, **I.C.C. v. L. & S.Y. Ry. Co.**, 134 Fed. Rep. 942, 202 U.S. 613, but the principles of classification stated by the Commission are not questioned; it contains an elaborate discussion of the principles of classification and an analysis of the relevant considerations, such as cost of carriage, revenue to carrier, profit to shipper, etc.

Another principle governing rates for great staples is thus stated at p. 306, 9 I.C.C. "In the carriage of great staples, which supply enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carriers are both necessary and justifiable." And it was held that though the carriers may be at some greater expense to handle and transport hay than some other articles in the 5th or 6th class of the Official classification, the character, value, volume, and use of that commodity are such as to require **relatively** low rates for its carriage, *ibid.*

A classification of given articles is effected by a determination of their rate relationship. In a measure this is true when articles are grouped together under a commodity description in a commodity tariff as well as when they are included in official, western, or southern classification. In each case classification factors should be considered in determining what articles should be grouped. The groupings in the classifications, of course, have much wider application and, beside providing that certain articles should take the same rates, also provide that other articles should take higher or lower rates, as the case may be. Lumber lists, due to the fact that they include not only articles which take lumber rates but also articles at stated differentials over lumber, resemble more closely the three great classifications than do commodity descriptions generally, and if a lumber list were adopted, to be applied throughout the country (U.S.), it would to this extent be a classification of national scope which would remove the undue inequalities resulting from prevailing inconsistencies in the rate relationship of lumber and lumber products.

Rates on Lumber and Lumber Products 52 I.C.C. 598. Cases in which the elements of classification have been discussed are collected in **Re Western Classification**, 25 I.C.C. at p. 472.

The Board has held that in matters of classification and tolls established trade conditions or obligations, while not conclusive obstacles in the way of change, must be considered; it is a question of judgment what is a fair mean between the physical carrying power of a car, the public interest affected thereby and the conditions on which business is carried on. **Dominion Millers' Association v. Canadian Freight Association**, 21 C.R.C. 83.

Where different rates were charged for the carriage of different descriptions of coal, splint coal and cannel

coal, which the Commissioners found as a fact were competitive and commercially and substantially of the same description for the purpose for which they were used, and the cost of conveyance to the company was the same, it was held that their carriage at unequal rates was an undue prejudice to the complainants: **Nitshill Coal Co. v. Caledonian Ry. Co.**, 2 Ry. & C. Tr. Cas. 39.

In the **Pea Millers Case**, 3 C.R.C. 433, the rate on split peas for export was restored to the same rate as flour for export on the principle that the manufactured article is more valuable than the raw material from which it is made and should be better able to bear a higher rate.

This is a well established principle of transportation. **Butte Milling Co. v. Chicago & Alton Ry. Co.**, 15 I.C.C. 364.

The **governing principle of freight classification** is to so classify traffic and fix charges thereon, that the burdens of transportation shall be reasonably and justly distributed among the articles carried. This arises from the statutory obligation imposed on carriers not to charge unjust or unreasonable rates (section 325), or to impose any undue or unreasonable prejudice or disadvantage in any respect whatsoever, (section 316), **National Hay Association Case**, *supra*.

A **freight classification contains but a few general classes**. It is impossible to place in each class only such articles as resemble each other in character, use, value, volume, bulk, weight, risk, expense of handling and competition. The best that can be done is to place in the same class articles generally similar with commodities most nearly related to it in general character and other essential respects, *ibid.*, at p. 307.

An exact classification is impossible. Unless the number of classes is indefinitely increased there must always be articles in respect to which it will be very difficult to determine into which of two classes they should fall. If the elements which fix the class are substantially the same in case of two articles, then those articles should, **as a matter of law**, be classified alike, and to put one in one class and another in another, would be a **discrimination** and a violation of the Act, no matter what the purpose of doing it might be. **Rea v. Mobile & Ohio R.W. Co.**, 7 I.C.C. at p. 51.

No classification can be so minute as to conform to the differing varieties and conditions of traffic, and to

separate different grades or densities of the same article into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purpose of classification. **Casket Mfrs. Association of America v. B. & O. Ry. Co.**, 49 I.C.C. 327; **Acme Belting Co. v. A. & R. Ry. Co.**, 52 I.C.C. 15 at p. 17.

The object of a freight classification is the distribution of the cost of transportation, but a refinement of it is impossible with the limited number of merchandise classes and goods have therefore to be broadly grouped. A reduction in the rating of the dearer commodities that are able to bear a higher carrying toll must necessarily curtail the ability of the carrier to make lower tolls, without which cheaper commodities cannot move at a profit. **Montreal Board of Trade v. Canadian Freight Association**, 15 C.R.C. 429, thus luxuries which move in comparatively small quantities are given a higher classification than necessities. **Horne Co. v. Canadian Freight Association**, 22 *ibid.* 344. An application to give the same rating in the classification to blaugas and gasoline because of competition between them was refused; the pressure of the toll on blaugas is much less than on gasoline, blaugas being more valuable and claimed to be a more efficient commodity. **Blaugas Co. v. Canadian Freight Association**, 12 C.R.C. 303, followed in **Roberts v. C.P.R.**, 18 *ibid.* 350; **Waterloo v. G.T.R.**, 24 *ibid.* 143.

Gramophones and graphophones were given a second class rating with musical instruments. **Berliner Gramophone Co. v. Canadian Freight Association**, 14 *ibid.* 175, 3 D.L.R. 496, and peanut butter was given a fourth class rating with jams and jellies with which it is in competition. **Toronto Board of Trade v. Canadian Freight Association**, 16 *ibid.* 442. Two L.C.L. ratings will not be granted on the same commodity differing in value. **Wallaceburg Cut Glass Works v. Canadian Freight Association**, 22 *ibid.* 408, but where carload classification (C.L.) rating from Wallaceburg, a manufacturing centre to Winnipeg, was voluntarily put in by the carriers, similar commodity tolls should be given from the same point to Montreal and Toronto, similar distributing points in the east, *ibid.*

Tariffs of tolls should be interpreted literally without reference to unexpressed intention of the carriers framing them. **Spanish River Pulp & Paper Mills v. C.P.R.**, 19 C.R.C. 381; **Imperial Steel & Wire Co. v. G.T.R.**, 24 C.R.C. 150. When ambiguous they are to be construed

in ease of the shipper. **United Grain Growers v. Canadian Freight Association**, 24 *ibid.* 128; **C.P.R. v. Ryan & Turner**, (Ont. Court of Appeal) 25 *ibid.* 178, 51 D.L.R. 242.

Classification of railroad ties in a different class from other lumber is an unjust discrimination. **Reynolds v. Western, New York & Pennsylvania R.W. Co.**, 1 I.C.C. 685; **Scobell v. Kingston & Pembroke R.W. Co.**, 3 Can. Ry. Cas. 412. Common carriers in making rates cannot arrange them from an exclusive regard to their own interests, but must have respect to the interest of those who employ their services and must subordinate their own interests to the rules of relative equality and justice, *ibid.*

Poles and piling from the North Pacific Coast and inland empire should take no higher rates than on fir lumber. **Rates on Lumber and Lumber Products**, 52 I. C.C., 598 at p. 627.

In classification, the market value of articles of commerce and the shipper's representation to the public as to their character, may properly be taken into consideration in ascertaining the analogy they bear to other articles and determining the class to which they justly belong, especially as to articles in which there is no free competition. Carriers are not required to estimate the intrinsic value of freight as distinguished from its commercial value for purposes of classification and rates. So held in **Warner v. New York Central & Hudson River R.W. Co., et al.**, 3 I.C.C. 74, where a higher classification for patent medicines than for ale, beer, and mineral water was held not unjust. So also in the case of toilet soap as compared with laundry soap, **Andrews v. Pittsburg, Cincinnati & St. Louis R.W. Co., et al.**, 3 I.C.C. 77.

Hardwood flooring should not have the same rating as cheap soft lumber, except fir, being a more valuable commodity; **Seaman, Kent Co. v. C.P.R.**, 13 C.R.C. 420. Live poultry in carloads are not entitled to the same classification tolls as ordinary live stock on account of the difference in tonnage moved and the aggregate earnings from live stock as compared with poultry; in making a freight toll, reshipment of the finished product is always to be considered. **Warrington v. Canadian Freight Association**, 24 *ibid.* 155. The ex-lake toll on corn should be the same as wheat, oats and barley. **Montreal Board of Trade v. G.T.R. and C.P.R.**, 14 *ibid.* 351.

Applications to reduce cigars from a L.C.L. first class to a C.L. fourth class: **Ledoux v. Can. Frt. Assn.**, 12 C.R.C.

3, and to increase the rating of C.L. and L.C.L. tobacco were refused. **Can. Frt. Assn. v. Tobacco Merchants**, 12 *ibid.* 299. Fibre board cheese boxes are entitled to the same classification as wooden cheese boxes. **Canada Cheese Box Co. v. Can. Frt. Assn.**, 22 *ibid.* 347. Following the U.S. classification flannelette sheets will not be given the same rating as cotton piece goods, **Montreal Board of Trade v. Can. Frt. Assn.**, 15 *ibid.* 429. The shipment of rubber boots and shoes in mixed carload lots at third class tolls in competition with manufacturers who have not the same privilege of mixing leather or felt boots with other leather or felt commodities entitled to the same classification in carload lots will not be authorised. **Canadian Rubber Mfrs. v. Canadian Frt. Assn.**, 23 *ibid.* 50. Shell blanks being a transient article of commerce are not specifically provided for in the freight classification, being covered where necessary by commodity tolls; these void the "analogous articles" rule of classification. **Imperial Munitions Board v. C.P.R.**, 24 *ibid.* 169.

Railway officials who have made a classification cannot testify to their understanding of its construction. It is for the general information of the public, and should be expressed in plain terms, so that an ordinary business man can understand it, and with the table of rates determine for himself the charge for transportation of a given article. Terms of art or terms peculiar to any business may be explained by those engaged in such business, but not by railroad experts in the sense understood by them. **Hurlburt v. L. S. & M. S. Ry. Co.**, 2 I.C.C. 81.

Tariffs—General Provisions.

Tariffs
of tolls.

Preparation
and issue.

Local or
general.

Approval by
Board.

323. (1) The company or the directors of the company, by by-law, or any officer of the company who is thereunto authorised by a by-law of the company or directors may from time to time prepare and issue tariffs of the tolls to be charged in respect of the railway owned or operated by the company, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

(2) The tolls may be either for the whole or for any particular portion of the railway.

(3) All such by-laws shall be submitted to and approved by the Board.

(4) The Board may approve such by-laws in whole or in part, or change, alter or vary any of the provisions therein.

Nature of approval.

(5) No tolls shall be charged by the company or by any person in respect of a railway or any traffic thereon until a by-law authorising the preparation and issue of tariffs of such tolls has been approved by the Board, nor, unless otherwise authorised by this Act, until a tariff of such tolls has been filed with, and, where such approval is required under this Act, approved by the Board, nor until any other requirements necessary under this Act to bring such tariff into effect have been complied with; nor shall any tolls be charged under any tariff or portion thereof disallowed by the Board, or not in effect in accordance with the provisions of this Act; nor shall the company charge, levy or collect any toll or money for any service as a common carrier except under and in accordance with the provisions of this Act.

No tolls unless authorised.

(6) The Board may, with respect to any tariff of tolls, other than the passenger and freight tariffs in this Act hereinafter mentioned, make regulations fixing and determining the time when, the places where, and the manner in which, such tariffs shall be filed, published and kept open for public inspection. 1908, c. 61, s. 11. Am.

Regulations as to publication.

Former section 314 amended, and new sub-section 6 added in 1908, ch. 61, sec. 11. Sub-section 1 has been amended by striking out after "charged" in the fifth line the words "as hereinafter provided, for all traffic carried by the company upon the railway or in vessels" and substituting the words "in respect of the railway owned or operated by the Company." Sub-section 5 has been amended to provide more explicitly that the tariffs shall not in any case go into effect until all the requirements of the Act have been complied with and that no tolls shall be charged except in accordance with the Act.

Where the tolls had not been approved as required by section 227 (1888), a passenger was held not entitled to recover back money paid by him under a mistake of fact, where it was such as in equity and good conscience he ought to have paid. **Lees v. Ottawa & New York R. W. Co.** (1900), 31 O.R. 567.

This case was followed in **Grand Lodge Knights of Pythias v. Great Northern R.W. Co.**, 7 C.R.C. 263 where a reduced excursion rate was agreed to be given but afterwards the full fare was charged; it was held, notwithstanding the absence of approval under section 331, (1906), now section 334, that the amount over-paid could be recovered back. See **Scott v. Midland Ry. Co.**, 33 U. C.R. 580; also **Rodger v. Minudie Coal Co.**, 8 C.R.C. 424, 32 N.S.R. 210. The Board has no jurisdiction to enforce any special rates other than those in the authorised tariff: relief (if any) must be sought in the ordinary courts, 4th Ann. Rep. 239.

“Unless otherwise ordered by this Act” sub-section 5, refers as to passenger tariffs to section 345. Such approval is not required in the case of special freight and competitive tariffs specified in sections 331-332.

The provisions requiring special tariffs are not inconsistent with a limitation imposed by the special act incorporating the Grand Trunk Ry. Co., 16 Vic., cap. 37, sec. 3, that the fare for third class passengers shall not exceed one penny per mile travelled, **Robertson v. G.T.R.**, 6 C.R.C. 494, 7 C.R.C. 267, 39 S.C.R. 506, (1909) A.C. 325, 9 C.R.C. 149.

The company must collect the tolls prescribed by its tariffs under the penalties prescribed by section 425. The Supreme Court of the United States has held that this must be done even though the agent of the company has quoted to the shipper a different rate in good faith, upon which the shipper has acted. **Texas and Pacific Ry. Co. v. Mugg**, 202 U.S. 242. Neither misquotation of rates nor ignorance is an excuse for charging or paying less or more than the filed rate: **L. & N. Ry. Co. v. Maxwell**, 237 U.S. 94 and cases cited; also **Poor v. C. B. & Q. Ry. Co.**, 12 I.C.C. 418. In **Urquhart v. C.P.R.**, 2 Alta L.R. 280, 12 C.R.C. 500, where the defendants' agent made a mistake in quoting the rate to a shipper, the latter was held entitled to recover damages occasioned to him by reliance upon the agent's statement in an action of deceit; the **Mugg Case** was distinguished. The Supreme Court of British Columbia in **Gillis v. C.M. & Puget Sound Ry. Co.**, 13 C.R.C. 35, 16 B.C.R. 254, held that an action of deceit did not lie under similar circumstances and disapproved the decision in the **Urquhart Case** of the Supreme Court of Alberta. In **Canadian Condensing Co. v. C.P.R.**, 12 C.R.C. 1, the Board refused to recognise a mistake made by the agent in quoting a rate as giving any right to recover the difference from the railway company. In

view of these expressions of opinion the judgment in the **Urquhart Case** cannot be considered as a valid authority.

Demurrage charges are included within the word "tolls" as used in the Railway Act, and are subject to control by the Board. **Duthie v. G.T.R.**, 4 C.R.C. at p. 321.

By sec. 2 (32) "toll" includes charges for cartage but the Board has no jurisdiction over cartage companies performing the service. Cartage is not a facility within the Act. The question of who should pay cartage is a matter of contract between the consignor and consignee. **In re Cartage Tolls**, 14 C.R.C. 372, 19 C.R.C. 389, 24 C.R.C. 80. Cartage may be substituted for interswitching if properly stated in the tariff of tolls. **Re General Interswitching Order**, 19 *ibid.* 376. A cab service maintained by a Railway Company to take passengers to and from its terminus in a city is not interstate commerce and the company is not exempt from a state privilege tax on the business of running cabs for hire within the state: **State of New York ex rel. Penna. Ry. Co. v. Knight**, 192 U.S. 21.

Tariffs of tolls (in the absence of indication to the contrary) cover only traffic originating at and for delivery upon its own tracks and connecting sidings within its own terminals and do not include traffic originating at, for delivery at, or near the same places upon the lines of another carrier. **Interswitching Rates Case, Canadian Manufacturers' Association v. Canadian Freight Association**, 7 C.R.C. 302.

Railway companies holding themselves out as carriers of perishable freight must provide the necessary refrigerator cars for transporting that traffic. It is the duty of the carrier to publish and file with the commission and observe its refrigeration charges and the commission may inquire into the reasonableness of such charges as of any other charges for the transportation of traffic. **Michigan Car Line Case**, 11 I.C.C. 129. See **Ontario Fruit Growers' Association v. Can. Frt. Association**, 22 C.R.C. 98, as to tolls for icing and salt.

In **Pere Marquette Ry. Co. v. Mueller Mfg. Co.**, 25 C.R.C. 168, 48 D.L.R. 468, 45 O.L.R. 312, it was held that section 314 (now section 323) prevents a carrier collecting tolls other than authorised and approved by the Board. Followed in **C.P.R. v. Ryan and Turner**, 25 C.R.C. 178, 51 D.L.R. 242. See also **Watson v. C.P.R.**, 19 C.R.C. 161, 20 D.L.R. 472, 32 O.L.R. 137, where it was as-

sumed that the only rate or toll recoverable was that authorised on the goods when properly described.

The Board has jurisdiction to disallow cartage tolls for services performed by a cartage company under agreement with a railway company where such tolls are not shown in a tariff filed with the Board, **Stewart v. C. P.R.**, 11 C.R.C. 197.

Form and
particulars.

324. All tariff by-laws and tariffs of tolls shall be in such form, size and style, and give such information, particulars and details, as the Board may, by regulation, or in any case, prescribe. R.S., c. 37, s. 322.

Disallow-
ance.

325. (1) The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

Substitution.

Effective
date.

(2) The Board may designate the date at which any tariff shall come into force, and either on application or of its own motion may, pending investigation or for any reason, postpone the effective date of, or either before or after it comes into effect, suspend any tariff or any portion thereof.

Amendment.

(3) Except as otherwise provided, any tariff in force, except standard tariffs hereinafter mentioned, may, subject to disallowance or change by the Board, be amended or supplemented by the company by new tariffs, in accordance with the provisions of this Act.

Consolida-
tion.

(4) When any tariff has been amended or supplemented, or is proposed to be amended or supplemented, the Board may order that a consolidation and re-issue of such tariff be made by the company. R.S., c. 37, s. 323. Am.

Powers to
fix rates not
limited.

(5) Notwithstanding the provisions of section three the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not

be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that this sub-section shall remain in force only during the period of three years from and after the date of the passing of this Act.

Former section 323, sub-sec. 2 has been amended by providing that the Board may postpone or suspend any tariff or portion thereof; "except as otherwise provided" has been prefixed to sub-sec. 3; sub-sec. 4 has also been amended to provide for proposed changes in any tariff. Sub-sec. 5 is entirely new and was added by the present Act for a period of three years only from its date.

In the **Western Freight Rates Case** (1914) 17 C.R.C. 123, a list of the principal changes in rates made by the Board since its inception is given and the preceding cases are reviewed. In that case the tolls were admitted to be higher in Western than Eastern Canada but the existing discrimination was not held to be unjust being justified by water competition and competition of U.S. railways in Eastern Canada. Railway tolls should be of such character as to attract investment and render railway securities marketable and give a fair return independent of the reserves or liabilities of the railway company: they should not be based upon cost plus a fixed percentage to cover overhead or capital charges. Effect cannot be given to contentions based upon results obtained by lines in the United States. In 1916 the Board authorised increases in tolls under special freight tariffs, **In re Eastern Tolls**, 22 C.R.C. 4, for reasons fully stated in the report due to increase in operating expenses and in order to yield a return sufficient to provide facilities and rolling stock. In 1917 a general increase in rates of 15 per cent was authorised, subject to the Crow's Nest Pass agreement and Statute, (60-61 Vict., ch. 5) which the Board without the authority given by sub-sec. 5 could not overrule. See also **Hamilton Radial Ry. Co. v. City of Hamilton**, 23 C.R.C. 114. In 1918 the Board made an order

increasing passenger tolls of $2\frac{1}{2}$ cents per mile by 15 per cent and the toll on coal by 15 cents a ton as in the case of steam railways on account of capital charges, increases in wages and cost of supplies and operation of line, with similar relief to other electric railways. **In re London & Port Stanley Ry. Co.**, 24 C.R.C. 160.

Whether an advance in rates should be made depends upon (1), whether it is reasonable, having regard to cost and value of service; and as compared with rates on other commodities; (2), whether it is reasonable in the absolute, regarded as a tax upon the people who ultimately pay the transportation charge: **Re Proposed Advance in Freight Rates**, 9 I.C.C. 382.

The question whether rates are unjust and unreasonable in themselves is in some measure relative, and may be tested for particular rates with those accepted elsewhere for similar services, **I.C.C. v. East Tennessee Ry. Co.**, 85 Fed. Rep. 107.

A rate can seldom be considered "in and of itself." It must be taken almost invariably in relation to and in connection with other rates. The freight rates, both upon different commodities and between different localities, are largely interdependent, and it is that they do not bear a proper relation to one another, rather than that they are absolutely either too high or too low, which most often gives ground for complaint: **Tileston v. Northern Pacific Ry. Co.**, 8 I.C.C. 346.

Through rates are not required to be made on a mileage basis nor local rates to correspond with the divisions of a joint through rate over the same line. Mileage is usually an element of importance, and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges. **McMorran v. G.T.R.**, 2 I.C.C. 604.

The conditions affecting through shipments at through rates, are such that a division of through rates cannot be taken as a measure of the reasonableness of a local rate. The competition of other grain growing territories fixes the rate on through shipments. **Kerr v. C.P.R.**, 9 C.R.C. 207.

When the reasonableness of rates is in question, the charges made on long through lines cannot form a just basis for comparison with local rates for relatively short distances. **Crews v. Richmond & D.Ry. Co.**, 1 I.C.C. 703.

The question of distance becomes in many cases a minor consideration where capital has been invested on

the strength of a given rate. The rate will not be disturbed without taking into account the effect on commercial and industrial conditions. **Doolittle v. G.T.R. (Stone Quarry Rates Case)**, 8 C.R.C. 10; **Green Bay v. Baltimore & Ohio Ry. Co.**, 15 I.C.C. 59.

Investments, however, made in expectation of continuance of rates cannot defeat the right of carriers to charge just and reasonable rates, and such considerations though persuasive are not conclusive. **Chattanooga Log Rates**, 35 I.C.C. 163-168; **So. Pac. Ry. Co. v. I. C.C.**, 219 U.S. 433. Where a carrier has voluntarily established a rate and it has remained in force for some time, it becomes presumptively reasonable and the carrier must justify an increase. **Cadwell Sand & Gravel Co. v. Can. Frt. Assn.**, 15 C.R.C. 156, 12 D.L.R. 48.

The Rate-per-ton-per-mile rule brings rates down to the narrowest point of scrutiny, and for that purpose is valuable, but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot therefore be accepted as controlling in determining the reasonableness of rates. **Gustin v. A.T. & S.F. Ry. Co., et al.**, 8 I.C.C. 277. **Cedar Hill Coal & Coke Co. v. Colorado & Southern Ry. Co.**, 16 I.C.C. 387.

The ton mile toll is not an infallible measure of the reasonableness or otherwise of a rate or toll, but should be given due weight. **Dawson Board of Trade v. White Pass & Yukon Ry. Co.**, 11 C.R.C. 402.

The mere fact that rates on certain traffic yield more revenue than the average on all traffic of the carrier is not conclusive that they are higher than reasonable. If that were so accepted, the result would be a continual reduction of rates that yield higher than the average revenue until all rates were on a common level. **Certain-Teed Products Corp'n. v. Penn. Ry. Co.**, 52 I.C.C. at p. 100. The average revenue per ton per mile of all freight movements will not justify a reduction of tolls by the Board. The traffic moved must be of sufficient volume and the hauls of sufficient length to give proper remuneration. **Western Ontario Municipalities v. G.T.R. et al.**, 18 C.R.C. 329, see also pp. 358 and 365.

The I.C. Commission has several times held that where a particular industry has grown up under rates voluntarily established and maintained by carriers, these rates can not be advanced without considering the effect upon that industry. There is no such thing as a contract

between the railway and the shipper that a certain rate shall be charged, for the railway rate is a matter of public concern, which cannot ordinarily be made the subject of private contract, but in determining what is the just and reasonable thing to be done this Commission must consider the effect upon all parties. **Beatrice Creamery Co. v. Illinois Central Ry. Co.**, 15 I.C.C. 109.

There is no conclusive presumption that a rate reasonable today was reasonable a year or a day before and since reasonable rates vary from time to time, some point of division must be found. **Penrod Co. v. Chicago, Burlington & Quincy Ry. Co.**, *ibid.*, 328.

Sub-section 2 does not authorise the Board to make a retroactive order. **Dominion Concrete Co. v. Canadian Pacific Ry. Co.**, 6 C.R.C. 514, followed in **Laidlaw Lumber Co. v. Grand Trunk Ry. Co.**, 8 C.R.C. 192, or grant rebates or refunds of tolls which have been charged.

The Board has power to declare what the legal rate was or should have been, leaving the parties to whatever redress they are entitled to. **Dominion Millers Association v. G.T.R.**, 12 *ibid.* 363. But where no further shipments are to be made such a ruling will not be made solely for the purpose of claiming a refund. **St. Lawrence, etc., Co. v. C.P.R.**, 24 *ibid.* 107. Where the toll has become legally operative the Board whose jurisdiction is in no sense retroactive cannot grant a refund. In **re Freight and Passenger Tolls**, 10 C.R.C. 343, where a toll was charged under a cancelled joint tariff the railway was authorised to make a refund of the difference between such toll and that chargeable under a substituted tariff. **Quebec Central Ry. Co. v. Dominion Lime Co.**, 19 *ibid.* 281.

Where refunds apply under the Railway Act see **Randall v. C.P.R.**, 17 *ibid.* 252, and under Quebec Statute, **Quebec & Lake St. John Ry. Co. v. Kennedy**, 17 *ibid.* 291, 15 D.L.R. 400, 48 S.C.R. 520.

In **Imperial Munitions Board v. C.P.R.**, 24 C.R.C. 169, a refund was authorised of the excess in tolls beyond those in effect legally upon the respondents undertaking to repay such excess. The Board has no jurisdiction to order tariffs to be republished for reparation purposes only, *ibid.*

Tariffs are not retroactive and carriers can only collect the tolls therein authorised at the time of shipment. **Security Traffic Bureau v. Can. Frt. Assn.**, 21 C.R.C. 57.

Where conflicting rates are named in separate tariffs the rate first established is the legal rate upon the principle that lawfully established rates remain in effect until specifically cancelled. **Highland Iron & Steel Co. v. Director General**, 57 I.C.C. 547.

Where there is a conflict of rates the Board may make a declaratory order stating what rate is applicable in respect of a past transaction. **British American Oil Co. v. G.T.R.**, 9 C.R.C. 178.

Tolls fixed in the United States are not the criteria of reasonable tolls in Canada. The Board must examine the circumstances for itself: **Manitoba Dairymen's Assn. v. Dominion Express Co. et al**; 14 C.R.C. 142, **Riley v. Dominion Express Co.**, 17 C.R.C. 112.

It is a general principle of rate construction that a longer haul should ordinarily yield a lower rate per ton mile unless different transportation conditions are involved such as thinner traffic on part of the route. **State of Iowa v. N.Y.C. & H.R. Ry. Co.**, 29 I.C.C. 536.

Where the growing necessity of raising breadstuffs for our own people instead of importing them from abroad was urged as a reason for reduction in rates, the I.C. Commission held that it would hardly be justified in considering a question of national policy in gauging the single question of the reasonableness and justice of existing rates. **Railroad Commissioners of Montant v. B.A. & P. Ry. Co.**, 31 I.C.C. 653.

The reasonableness or unreasonableness of freight rates cannot be gauged solely by the ability or inability of shippers under depressed market conditions to market their products with profit under existing rates, *ibid* p. 644.

The basis of rate making so far as the unit of weight is concerned is 100 lbs. and tolls vary with the weight. **Roberts v. C.P.R.**, 18 C.R.C. 350.

Upon the principle of charging on the unit of weight, a flat toll instead of a toll by weight on shipments of wood to municipalities for distribution among their citizens at cost was refused. **Town of Waterloo v. G.T.R.**, 24 C.R.C. 143. The universal basis in fixing tolls is weight of product carried. A comparison between the tolls on a carload of the product and the quantity of material required to produce it is impracticable. **Adolph Lumber Co. v. G.N.R.**, 24 *ibid*. 173. Toll should be

charged upon the principle that proper expenses of maintenance, transporting traffic, general expenses, fixed charges and a fair dividend upon the capital invested should be paid. **Dawson Board of Trade v. White Pass & Yukon Ry. Co.**, 11 C.R.C. 402; **Nor. Pac. Ry. Co. v. North Dakota**, 236 U.S. 585. Tolls must be reasonable having regard to the carrier just as much as to the travelling public. A toll is unreasonable where it is too low as well as too high. **Burlington Beach Commissioners. v. Hamilton Radial Electric Ry. Co.**, 24 C.R.C. 39; **Lumber Rates from the Southwest to Points North**, 29 I. C.C. 1 at p. 15; **Excelsior from St. Paul**, 36 I.C.C. 349 at p. 365.

References
in super-
seding
tariffs.

326. (1) Every tariff superseding or intended to supersede any other tariff or tariffs, or any portion or portions thereof, shall specify the tariff or tariffs, or portion of portions thereof, which it supersedes or is intended to supersede, by giving the reference number or referring to the page and section or item in such a way as to facilitate an accurate and ready reference to what is superseded or intended to be superseded.

Supplements
to cancelled
tariffs.

(2) When any tariff is cancelled without being superseded by a tariff of like issue, a supplement shall be issued to such cancelled tariff and such supplement shall specify the tariff wherein the tolls may thereafter be found.

This section is new.

The Board has jurisdiction over charges for carriage by water when such carriage is under control of a railway company. **Currie v. C.P.R.**, 13 C.R.C. 31.

Fraction of
a mile.

327. (1) In all cases a fraction of a mile in the distance over which traffic is carried on the railway shall be considered as a whole mile.

Fraction of
five pounds
in weight.

(2) In estimating the weight of any goods in any one single shipment on which the toll amounts to more than the minimum, or "smalls" toll, any fraction of five pounds shall be waived by the company, and five or any fraction above five and up to ten pounds shall be deemed ten pounds by the company.

Fraction of
five cents.

(3) In estimating the tolls to be charged in passenger tariffs hereafter issued any amount not exceeding two

and a half cents shall be waived by the company, and above two and a half cents and up to five cents shall be considered as five cents by the company. R.S., c. 37, s. 324. Am.

Former section 324, slightly amended in sub-sec. 3 without altering the substance. If a special tariff of two cents instead of the standard three cents per mile be charged, 25 cents may be collected instead of 20 or 22 cents. 4th Ann. Rep. p. 194.

Freight Tariffs.

328. The tariffs of tolls which the company shall be authorised to issue under this Act for the carriage of goods between points on the railway shall be divided into three classes, namely,—

Division of
freight
tariffs.

(a) the standard freight tariff;

Standard.

(b) special freight tariffs; and,

Special.

(c) competitive tariffs. R.S., c. 37, s. 325.

Competitive.

Commodity or Special Freight Tariffs have reference to schedules applicable to such articles as grain, lumber, coal, live stock, dressed beef, fertilizers, oil, etc., transported between sections of the country where these articles have attained a commercial and shipping importance which has made necessary specific rules for their transportation differing from those covering classified traffic, as well as a somewhat lower scale of rates than is applied to the latter. The standard freight tariff is arranged to show the rates of the respective classes contained in the freight classification. In them are found the great majority of articles carried by the railways classified in accordance with the various elements that properly enter into the determination of freight charges. Under these are also found the commodities mentioned in the Special Freight Tariffs. Although these are exceptionally treated in some sections as to tolls or rates, they are all amenable to some rule of the classification. The rate-making foundation for all commodities is seen to be largely in the freight classification. 17th Annual Report, Interstate Commerce Commission (1903), p. 116.

Freight classification under section 322 applies to all tariffs whether standard, competitive or through tariffs. **C.P.R. v. Canadian Oil Cos.**, 17 C.R.C. 411, 19 D.L.R. 64, (1914), A.C. 1022.

The intention of the Act is to require all freight to be carried under one or other of four tariffs, Standard, Special, Competitive or Joint, with the exception mentioned in section 344.

Special or joint tariffs are based upon the rules prescribed by the Act, and are controlled by the long and short haul clause, sec. 314 (5), but a competitive tariff is not. All these tariffs must be filed with the Board, (sections 330, 331, 332, 336). The standard tariff requires the approval of the Board before it comes into force, and after such approval it must be published in the **Canada Gazette**. In the case of special, competitive, and joint tariffs, prior approval by the Board is not required before these tariffs come into force. They are, however, subject subsequently to disallowance by the Board. Copies must be filed at the stations or offices of the company where freight is received, carried to, or delivered thereunder (section 342 (b), (c), (d), (e), and (f)). There is the same provision for standard tariffs, section 342 (a). These provisions, however, are all subject to regulation by the Board, section 342 (4), and in the case of competitive tariffs both filing and publication may be dispensed with by the Board, section 332. Three days' previous notice must be given in the case of special tariffs of any reduction and thirty days' previous notice of an increase before either comes into effect.

What
standard
freight tariff
to specify.

329. (1) The standard freight tariff, or tariffs, (where the company is allowed by the Board more than one standard freight tariff), shall specify the maximum mileage tolls to be charged for each class of the freight classification for all distances covered by the company's railway.

Distances.

(2) Such distances may be expressed in blocks or groups, and such blocks or groups may include relatively greater distances for the longer than for the shorter hauls.

What special
freight tariffs
to specify.

(3) The special freight tariffs shall specify the toll or tolls, lower than in the standard freight tariff, to be charged by the company for any particular commodity or commodities, or for each or any class or classes of the freight classification, or to or from a certain point or points on the railway; and greater tolls shall not be charged for a shorter than for a longer distance over the

same line in the same direction, if such shorter distance is included in the longer.

(4) The competitive tariffs shall specify the toll or tolls, lower than in the standard freight tariff, to be charged by the company for any class or classes of the freight classification, or for any commodity or commodities, to or from any specified point or points which the Board may deem or have declared to be competitive points not subject to the long and short haul clause under the provisions of this Act. R.S., c. 37, s. 326. Am.

What competitive tariffs to specify.

Sub-sec. 2, too rigid adherence to mileage basis where tolls are blanketed is undesirable. **Galbraith Coal Co. v. C.P.R.**, 10 C.R.C. 325. **Great West Coal Co. v. G.T.P.**, 23 *ibid.* 175. The Board has no jurisdiction to enforce special contracts for rates other than those in lawful tariffs. **Malaher's Complaint**, 4th Ann. Rep. 238.

330. (1) Every standard freight tariff shall be filed with the Board, and shall be subject to the approval of the Board.

Standard freight tariff. Filing.

(2) Upon any such tariff being filed and approved by the Board the company shall publish the same, with a notice of such approval in such form as the Board directs in at least two consecutive weekly issues of the **Canada Gazette**.

Approval.

Publication.

(3) When the provisions of this section have been complied with, the tolls as specified in the standard freight tariff or tariffs, as the case may be, shall, except in the cases of special freight and competitive tariffs, be the only tolls which the company is authorised to charge for the carriage of goods.

Tolls specified to be the only lawful tolls.

(4) Until the provisions of this section have been complied with, no toll shall be charged by the company.

No toll until compliance.

(5) No standard freight tariff shall be amended or supplemented except with approval of the Board. R.S., c. 37, s. 327. Am.

Changes to be approved.

Former section 327 amended by adding sub-sec. 5, which is new. Sub-section 3, see cases cited under sub-sec. 5 of sec. 323. The Board may not make a retroactive order. See cases discussed under sub-sec. 2, sec. 325.

Special
freight
tariffs.

331. (1) Special freight tariffs shall be filed by the company with the Board, and every such tariff shall specify the date of the issue thereof and the date on which it is intended to take effect.

If tolls
previously
in force
are reduced.

Notice.

(2) When any such special freight tariff reduces any toll previously authorised to be charged under this Act the company shall file such tariff with the Board at least three days **before its effective date**, and shall, for three days previous to the date on which such tariff is intended to take effect, deposit and keep on file in a convenient place, open for the inspection of the public during office hours, a copy of such tariff, at every station or office of the company where freight is received, or to which freight is to be carried thereunder, and also post up in a prominent place, at each such office or station, a notice in large type directing public attention to the place in such office or station where such tariff is so kept on file: Provided that the Board may by regulation or otherwise determine and prescribe any other or additional method of publication of such tariff during the period aforesaid.

If previous
tolls
advanced.

(3) When any such special freight tariff advances any toll previously authorised to be charged under this Act, the company shall in like manner file and publish such tariff **thirty** days previously to the date on which such tariff is intended to take effect: Provided that where objection to any such tariff is filed with the Board, the burden of proof justifying the proposed advances shall be upon the company filing said tariff.

When tariff
effective.

(4) **When the foregoing provisions have been complied with**, any such special freight tariff, unless suspended or postponed by the Board, shall take effect on the date stated therein as the date on which it is intended to take effect, and the company shall thereafter, until such tariff is disallowed or suspended by the Board or superseded by a new tariff, charge the toll or tolls as specified therein, and such special freight tariff shall supersede any preceding tariff or tariffs, or any portion or portions thereof, in so far as it reduces or advances the tolls therein.

(5) Until such special freight tariff comes into effect, no such special freight toll or tolls shall be charged by the company. R.S., c. 37, s. 328; 1911, c. 22, s. 11. Am.

No tolls
until tariff
in force.

Former section 328, sub-sec. 5 is new.

Sub-secs. 2, 3 and 4 have been re-drafted with the important addition to sub-sec. 3 as to the burden of proof being on the Company filing the tariff.

332. Competitive tariffs shall be filed by the company with the Board and every such tariff shall specify the date of the issue thereof and the date on which it is intended to take effect: Provided that where it may be necessary to meet the exigencies of competition, or as the Board may deem expedient, the Board may make rules and regulations governing the filing or publication of such tariffs, and may provide that any such tariffs may be acted upon and put in operation immediately upon the issue thereof by the company, before they have been filed with the Board, or may in any case make a special order or direction allowing any such tariff to go into effect as the Board shall appoint. R.S., c. 37, s. 329. Am.

Competitive
tariffs.

Filing.

Former section 329 amended by adding the last three lines.

Passenger Tariffs.

333. (1) The tariffs of tolls which the company shall be authorised to issue under this Act for the carriage of passengers between points on the railway shall be divided into two classes, namely,—

Division of
passenger
tariffs.

- (a) the standard passenger tariff; and,
- (b) special passenger tariffs.

Standard.
Special.

(2) The standard passenger tariff, or tariffs (where the company is allowed by the Board more than one standard passenger tariff), shall specify the maximum mileage toll or tolls to be charged for passengers for all distances covered by the company's railway; and such distances may be expressed in like manner as provided herein in respect of standard freight tariffs.

What
standard
passenger
tariffs shall
specify.

(3) Special passenger tariffs shall specify the toll or tolls to be charged by the company for passengers, in

What special
passenger tar-
rif shall
specify

every case where such tolls are lower than the tolls specified in the company's standard passenger tariff. R.S., c. 37, s. 330. Am.

Former section 330 amended by the provision for more than one standard passenger tariff in sub-sec. 2.

Standard
passenger
tariff.

334. (1) A standard passenger tariff shall be filed, approved and published, **and amended or supplemented**, in the same manner as required by this Act in the case of a standard freight tariff.

Approved
and
published.

(2) Until the company files its standard passenger tariff and such tariff is so approved and published in the **Canada Gazette**, no tolls shall be charged by the company.

Tolls
authorised.

(3) When the provisions of this section have been complied with, the tolls in the standard passenger tariff shall, except in the case of special passenger tariffs, be the only tolls which the company is authorised to charge for the carriage of passengers. R.S., c. 37, s. 331. Am.

Former section 331, the provision in sub-sec. 1 as to amending or supplementing such tariffs is new.

The same general provisions as to filing and publication are applicable to Passenger as to Freight Tariffs. No provision is made for Competitive Passenger Tariffs. It will be noted that in the case of both Freight and Passenger Tariffs no tolls shall be charged by the company until the requirements of the Act are complied with. These provisions are similar to section 227 of the Act of 1888. In a case where the tolls have voluntarily been paid the case of **Lees v. Ottawa & New York Ry. Co.**, 31 O.R. 567, that the amount so paid cannot be recovered back where it is such as in equity and good conscience ought to have been paid, may still apply. **Grand Lodge, Knights of Pythias v. Great Northern R.W. Co.**, 7 C.R.C. 263. See also **Rodger v. Minudie Coal Co.**, 8 C.R.C. 424, 32 N.S.R. 210.

Special
passenger
tariffs.

335. (1) The company shall file all special passenger tariffs with the Board at least three days before the effective date and shall, for three days previous to the date on which any such tariff is intended to take effect, deposit and keep on file in a convenient place,

open for the inspection of the public during office hours, a copy of each such tariff, at every station or office of the company where passengers are received for carriage thereunder, and also post up in a prominent place at each such office or station a notice in large type directing public attention to the place in such office or station where such tariff is so kept on file: Provided that the Board may, owing to the exigencies of competition or otherwise, notwithstanding anything in this section contained, determine the time or manner within and according to which publication of any such tariff is to be made.

Notice.

(2) The date of the issue and the date on which, and the period, if any, during which, any such tariff is intended to take effect, shall be specified therein.

Date and period.

(3) **When the foregoing provisions have been complied with**, any such tariff, unless suspended or postponed by the Board, shall take effect on the date stated therein as the date on which it is intended to take effect, and the company shall thereafter, until such tariff is disallowed or suspended by the Board or expires or is superseded by a new tariff, charge the toll or tolls as specified therein, and such tariff shall supersede any preceding tariff or tariffs or any portion or portions thereof, in so far as it reduces or advances the tolls therein.

When effective.

(4) Until such tariff comes into effect no such toll or tolls shall be charged by the company. R.S., c. 37, s. 332. Am.

No toll before tariff.

Former section 332, sub-secs. 3 and 4 have been re-drafted for greater definiteness.

Joint Tariffs.

336. (1) Where traffic is to pass over any continuous route in Canada operated by two or more companies, the several companies shall agree upon a joint tariff for such continuous route, and the initial company shall file such joint tariff with the Board, and the other company or companies, shall promptly notify the Board of its or their assent to and concurrence in such joint tariff.

Continuous route in Canada.

Joint tariffs, shall be agreed upon.

(2) The names of the companies whose lines compose such continuous route shall be shown by such tariffs.

Names of companies.

Continuous
route in the
case of
carriage by
water.

(3) If the company owns, charters, uses, maintains or works, or is a party to any arrangement for using, maintaining or working vessels for carrying traffic, by sea or inland water, between any places or ports in Canada, and if any such vessel carries traffic between a port in Canada reached by such company and a port in Canada reached by the railway of another company, the vessel and the railway of either company shall be deemed to constitute a continuous route in Canada within the meaning of this section. R.S., c. 37, s. 333. Am.

Former section 333, amended by substituting "shall" for "may" in the third line of sub-sec. 1.

Section 6 of the Interstate Commerce Act corresponds to this and succeeding sections where a through route and joint rate have been established by each common carrier filing schedules giving the necessary information and keeping them open for public inspection. Sub-sec. 11 of sec. 6 provides a penalty of \$250 for refusal or misstatement of rate. See sections 385 and 444 as to penalties under the Railway Act.

It is more correct to speak of a through rate as being concerned with a joint tariff movement over two or more railways. In **Dawson Board of Trade v. White Pass & Yukon Ry. Co.**, 9 C.R.C. 190, the water route from White Horse to Dawson was held not to be part of a "continuous route in Canada." See also **Algoma Central etc., Ry. Co. v. G.T.R.**, 8 *ibid.* 46, 5 *ibid.* 196.

Where
failure to
agree
Board may
decide.

337. (1) In the event of failure by such companies to agree upon any such joint tariff as provided in the last preceding section, the Board on the application of any company or person desiring to forward traffic over any such continuous route, which the Board considers a reasonable and practicable route, or any portion thereof, may require such companies, within a prescribed time, to agree upon and file in like manner a joint tariff for such continuous route, satisfactory to the Board, or may, by order, determine the route, fix the toll or tolls and apportion the same among the companies interested, and may determine the date when the toll or tolls so fixed shall come into effect.

Companies
to comply.

(2) Upon any such order being made the companies shall as soon as possible, or within such time as the Board

may require, file and publish a joint tariff in accordance with this Act, and in accordance with such order.

(3) In any case when there is a dispute between companies interested as to the apportionment of a through rate in any joint tariff, the Board may apportion such rate between such companies.

Apportion-
ment of
through rate.

(4) The Board may decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any company out of such through rate than the toll such company would otherwise be entitled to charge. R.S., c. 37, s. 334.

Power of
Board.

Former section 334.

The initiating carrier in the absence of instructions as to routing off its own lines is bound to send goods forward on the lowest toll combination available. **Sinclair v. Windsor, etc., Ry. Co.**, 18 C.R.C. 344. Connecting carriers should route shipments of vegetables and fruit by shortest possible route and file appropriate tariffs of tolls. **Similkameen Farmers Institute v. C.P.R., and G. N.R. Cos.**, 24 C.R.C. 125. In **Newman v. E. D. & B. C. Ry. Co.**, 22 C.R.C. 399, it was held that a lower or joint toll will not be granted to a retail dealer at a distant point (such as Winnipeg) seeking to do a mail order business through a well established distributing point (such as Edmonton, 848 miles from Winnipeg) into territory tributary thereto, which would give the shipper a toll lower than the local toll at the distributing point.

The presumption is that joint rates are unjust and unreasonable to the extent that they exceed the combination of local rates between the same points. **Lindsay Bros. v. Michigan Central Ry. Co., et al.**, 15 I.C.C. 40; **Fullerton Lumber Co. v. C.P.R.**, 17 C.R.C. 79. In **re Joint Freight and Passenger Tariffs**, 10 C.R.C. 343; but it does not follow as a corollary that the sum of the locals should always be reduced to equal the through rate; **Williams v. Vicksburg S. & P. Ry. Co.**, 16 I.C.C. 482; though under special circumstances a through passenger rate may be maintained which is greater than the sum of the locals: **Kurtz v. Pennsylvania Ry. Co.**, 16 I.C.C. 410; the general rule as to passenger fares must be the same as to freight rates, *ibid.*, p. 415.

Through Toll or Rate. Division of the through toll as between connecting carriers on hauls over two or more

lines is a matter of domestic concern and so long as the through toll is not unreasonable it does not matter to the public how it is divided. **West Virginia P. & P. Co. v. C.P.R.**, 23 C.R.C. 153.

The through toll or division of the through toll between two points is not necessarily a test of the reasonableness of the local toll to an intermediate point. **Lake Superior Paper Co. v. Algoma Central Ry. Co.**, 22 C.R.C. 361.

The Commission's power under the Act to establish **through rates** and **joint rates** is limited to this extent, that it may not require a carrier, without its consent to embrace in such through route substantially less than the entire length of its railroad which lies between the termini of such proposed through route unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established: **Marble Rates from Vermont Points**, 29 I.C.C. 607, and in **Waverly Oil Works v. P.R.R. Co.**, 28 I.C.C., 621, 630, the Commission said, "If a railroad has traffic in its possession, it shall be allowed to handle it by its own line as far as it can unless the public interest will suffer thereby."

The traffic must move on the joint route unless the lines of the single route afford a reasonable and practicable one. **Cole v. C.P.R.**, 22 C.R.C. 429.

See also **C.N.R. v. G.T.R.** (North Bay Case), 20 C.R.C. 84.

In **Wylie Milling Co. v. C.P.R. and K. & P. Ry. Co.**, 14 C.R.C. 5, 8 D.L.R. 593, the two companies for the purpose of fixing rates were treated as one company and joint tariffs establishing a through route ordered. See also **Oliver Serim v. C.P.R. and E. & N.R. Cos.**, 17 C.R.C. 324.

The scheme of the Act is that traffic moving over the lines of two or more carriers shall be considered and carried as through traffic on one bill of lading and not that local tolls be filed as proportionals and the traffic moved under separate bills of lading. The duty is cast upon the carriers to establish joint tolls for such traffic. It can be enforced under former section 334, now 337. **Imperial Oil Co. v. Canadian Freight Assn.**, 20 C.R.C. 171.

Traffic handled by two or more companies over connecting lines may well bear a heavier toll than if handled

by one only, and where two companies charged tolls equal to the sum of the locals over their respective lines, the Board refused to interfere, the charges not being shown as excessive, although a lower through toll had been charged when one company operated over both lines. **Shippers v. C.N.R. Express Co.**, 14 C.R.C. 183. **Sheridan v. C.B. & Q. Ry. Co.**, 26 I.C.C. 638.

338. When traffic is to pass over any continuous route from a point in Canada through a foreign country into Canada, or from any point in Canada to a foreign country, and such route is operated by two or more companies, whether Canadian or foreign, the several companies shall file with the Board a joint tariff for such continuous route. R.S., c. 37, s. 335.

From Canada
to foreign
country.

Former section 335.

The word "to" in the phrase "or from any point in Canada to a foreign country," is used to express the **destination** of the property by continuous carriage; it does not signify "at the boundary line." Such a construction is obviously very narrow and technical; it would render the law nugatory; and a broader meaning was necessarily intended. The word "to" in this connection means the destination of the property at any place within the state or country to which the continuous carriage extends. So held by the Interstate Commerce Commission when dealing with the corresponding section of the Interstate Commerce Act: **Re G.T.R. Co.**, 2 I.C.C. at p. 501; the Act was held to apply to foreign as well as domestic common carriers engaged in the transportation of passengers or property for a continuous carriage or shipment, from a place in the United States to a place in an adjacent foreign country (Canada).

The joint tariff referred to in this section would usually result where two companies own connecting roads and unite in making a **joint through tariff**, thus forming practically a new and independent line, but see **British American Oil Co's. Case**, *infra*. Under the Interstate Commerce Act it has been held that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned; **Chicago, etc., Ry. Co. v. Osborne**, 52 Fed. Rep. 912.

Through (*i.e.*, joint) rates are not required to be made on a strictly mileage basis, but mileage is, as a general rule, an element of importance; and due regard to distance proportions should be observed in connection with

the other considerations that are material in fixing transportation charges: **McMorran v. G.T.R. Co.**, 2 I.C.C. 604.

Under section 431 neglect to file this tariff renders the goods carried over a continuous route from a point in Canada through a foreign country into Canada subject to customs duties payable by the company or companies owning or operating part of such route in Canada. See section 341, *infra*, also **G.T.R. v. British American Oil Co.**, 9 C.R.C. 178, 43 S.C.R. 311. The Board has no jurisdiction to restore a joint tariff under this section: **Davy v. N. St. C. etc., Ry. Co.**, 43 S.C.R. 277.

As a matter of practice the Board has dealt with international joint tariffs having regard to the outward movement only; speaking generally it has not interfered with any tariff properly filed under the practice prevailing in the United States directly applying to a joint movement into Canada. **Auger v. G.T.R. and C.P.R.**, 19 C.R.C. 401. The Board has no jurisdiction over tolls charged in a foreign country (U.S.A.); it can only inquire into toll treatment in respect of movements in Canada. **Saskatchewan Bridge & Iron Co. v. Sault Ste. Marie Ry. Co.**, 19 C.R.C. 443; **Niagara, St. Catharines & Toronto Ry. Co. v. Davy**, 11 C.R.C. 109; same case No. 2, 12 C.R.C. 61, 43 S.C.R. 277. Similar decisions in the United States: **International Paper Co. v. D. & H. R. Co.**, 33 I.C.C. 270. The extent of the Commission's jurisdiction as to traffic from Canada into the United States is limited to the portion of the haul performed within the United States. **Emery & Co. v. B. & M. R. Co.**, 38 I.C.C. 636. But where railways constituting a through route for traffic from a point in Canada to a point in the United States concurred in a through rate that was unreasonably high, they are jointly and severally responsible for any damage that may result to any shipper on account of such unlawful rate. **Larrowe Milling Co. v. Chatham, Wallaceburg & Lake Erie Ry. Co.**, and **Michigan Central Ry. Co.**, 52 I.C.C. 145; **Eastern Car Co. v. Canadian Government Rys. et al.**, 51 I.C.C. 627; **Monarch Paper Co. v. Canadian Pacific Ry. Co., et al.**, 53 I.C.C. 620. No carrier in the United States can unduly prejudice a traveller or a locality in the United States merely because it is a party to a joint arrangement for through carriage. **Commercial Club of Omaha v. B. & O. Ry. Co., et al.**, 52 I.C.C. 255. **White Bros. v. Director General, American Railway Express et al.**, 57 I.C.C. 511.

From foreign
country to
Canada.

339. As respects all traffic which is carried from any point in a foreign country into Canada, or from a for-

eign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board. R.S., c. 37, s. 336.

Former section 336.

In **Dawson Board of Trade v. White Pass & Yukon Ry. Co.**, 9 C.R.C. 190, these sections were considered and an order made for the filing by the Pacific & Arctic Ry. Co., incorporated in West Virginia as well as by the respondents, an English company, of a joint tariff over the continuous route from Skagway in Alaska across a portion of British Columbia to White Horse in Yukon territory.

Under this section (formerly 336) the Board has no jurisdiction to order the initial foreign carrier to file or concur in joint tariffs, but it might require the connecting Canadian carrier to file same if the foreign carrier concurred or **vice versa** if such joint tariffs were considered just and reasonable by the Board. **Stockton & Mallinson v. Dominion Express Co.**, 13 C.R.C. 459, 3 D.L.R. 848, distinguishing **Stockton and Mallinson v. C.P.R.**, 9 C.R.C. 165.

See **Great Northern Ry. Co. v. C.N.R.**, 11 C.R.C. 424, where a proposed tariff was disapproved, there being already a reasonable through route and toll.

When the initial carrier has filed a tariff under this section (formerly 336) it becomes a joint tariff even if composed of the sum of the locals and cannot be changed unless superseded or disallowed under sec. 341 (formerly 338) **Canadian Oil Co. v. G.T.R. and C.P.R.**, 12 C.R.C. 334.

The Board's jurisdiction over through rates from points in the United States to Canadian points does not depend upon agreement or concurrence of Canadian railways. The filing of a joint tariff by a foreign railway company for such traffic is sufficient to give the Board jurisdiction to enforce against Canadian railways the rates therein specified. (Anglin J. dissents) **G.T.R. v. B. Am. Oil Co.**, 11 C.R.C. 118.

340. (1) No company shall, by any combination, contract or agreement, express or implied, or by other means or device, prevent the carriage of goods from being

Continuous
carriage not
to be pre-
vented.

continuous from the place of shipment to the place of destination.

Break in
bulk, etc.

(2) No break in bulk, stoppage or interruption made by such company shall prevent the carriage of goods from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act. R.S., c. 37, s. 337.

This section is taken almost *verbatim* (omitting after "prevent" the words "**by change of time schedule, carriage in different cars**"), from section 7, Inter-State Commerce Act. It is supplemental to the provisions of section 3, Interstate Commerce Act (see section 316 (3)), and should be read and construed therewith.

In *Board of Trade of Troy v. Alabama Midland Ry. Co. et al.*, 6 I.C.C. 1, the Interstate Commerce Commission held that the continuity of carriage of freight over a line formed by two or more roads, is not broken in **fact**, and cannot be broken in **law**, by the charge of a local rate by one (or more) of such roads as its proportion of the through rate.

This section is not confined to a continuous carriage within Canada. It extends to "one continuous carriage from the place of shipment to the place of destination," even though the boundary line of a foreign country may be crossed on the route. So held in *Re G.T.R. Co.*, 2 I.C.C. 496, in the case of shipments from Buffalo, Black Rock, and Suspension Bridge, in the United States, to Hamilton, Dundas, and several other points in Canada, where a rebate was made to certain consignees in Hamilton, Dundas, etc., and denied to others.

Filing and
publication
of joint
tariffs.

341. (1) Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded by another tariff or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board

Proviso.

may except from the provisions of this section the filing and publication of any or of all passenger tariffs of foreign railway companies.

(2) The Board may require to be informed by the company of the proportion of the toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received. R.S., c. 37, s. 338. Am.

Information
which Board
may require.

Former section 338. In sub-sec. 1, line 7, the words "by another tariff" have been added after "superseded."

In **Grand Trunk Ry. Co. v. British American Oil Co.**, (Stoy Case), 9 C.R.C. 178, 11 C.R.C. 118, 43 S.C.R. 311, the Indianapolis Southern Ry. Co. filed a joint tariff giving through rates from Stoy, a point in Southern Indiana to Toronto; the Grand Trunk having filed an "exception" to the rates in the tariff refused to accept their proportion of the through rate and deliver the traffic at destination. Upon application by the consignee for an order fixing the rates it was held that the procedure under this section, formerly 338, must be followed, that the tariff when filed remained in force and was binding upon the Grand Trunk till disallowed by the Board upon application for that purpose, that if a railway company in the United States without the approval of the connecting carrier in Canada files a joint tariff in which the latter does not desire to participate, the Canadian Carrier must apply under this section (formerly 338) to have it disallowed, if this is not done, the tolls in such tariff are the only tolls that can be charged until such tariff is disallowed or superseded by the Board, that if the Canadian carrier desires any change to be made in any classification used in the United States for such traffic it should apply under section 322 (4) formerly section 321 (4). See also **Re Joint Tolls and Concurrence**, 19 C.R.C. 379. Under this section the Board is not a mere recorder of supersession, but has the right to exercise its discretion and declare a former joint tariff to be still in force when disallowing a superseding tariff. A supplement filed by a United States carrier has not the effect of destroying a joint tariff. It must be superseded by another. **British American and Canadian Oil Cos. v. G.T.R. and C.P.R.**, 12 C.R.C. 327, 350 14 C.R. C. 201, 47 Can. S.C.R. 155, (1914) A.C. 1022. In that case it was held also that the Board had jurisdiction under former section 26, now 33, to declare what the legal rate

was or should have been, although no executive order was necessary on account of a subsequent authorised tariff. Joint tariffs as well as all others, standard or competitive, are subject to the provisions of section 322, former section 321.

Posting of Tariffs.

- | | |
|---------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Where to be posted. | 342. (1) The company shall deposit and keep on file in a convenient place, open for the inspection of the public during office hours, a copy of each of its tariffs, at the following places respectively,— |
| Standard tariffs. | (a) standard passenger and freight tariffs at every station or office of the company where passengers or freight, respectively, are received for carriage thereunder; |
| Special tariffs. | (b) special passenger and freight tariffs, at every station or office of the company where passengers or freight, respectively, are received for carriage thereunder, and such freight tariffs also at each of its stations or offices to which freight traffic is to be carried thereunder; |
| Competitive tariffs. | (c) competitive tariffs, at each freight station or office of the company where goods are to be received and delivered thereunder; |
| Joint tariffs in Canada. | (d) joint tariffs for traffic passing over any continuous route in Canada, operated by two or more companies, at each freight station or office where traffic is to be received, and at each freight station to which such tariffs extend; |
| Joint tariffs. | (e) joint tariffs for traffic passing over any continuous route operated by two or more companies, whether Canadian or foreign, from a point in Canada, through a foreign country into Canada, or from any point in Canada to a foreign country, at each freight station or office where such traffic is to be received, and at each freight station or office in Canada to which it is to be carried as its destination; |
| From Canada to foreign country. | |
| From foreign country to Canada. | (f) joint tariffs for traffic carried by any continuous route owned or operated by two or more companies, whether Canadian or foreign, from any point in a foreign country into Canada, or |

from a foreign country through Canada into a foreign country, at each freight station or office in Canada to which such tariffs extend.

(2) The company shall keep on file at its stations or offices, where freight is received and delivered, a copy of the freight classification, or classifications, in force upon the railway, for inspection during business hours.

Freight
classifica-
tions.

(3) The company shall post up in a prominent place at each of its stations where passengers or freight, respectively, are received for carriage, a notice in large type directing the public attention to the place in such station where the passenger or freight tariffs, respectively, are kept on file for public inspection during business hours, and the station agent, or person in charge at such station, shall produce to any applicant, on request, any particular tariff in use at that station which he may desire to inspect.

Notice to be
posted at
station of
place where
tariffs open
to inspection.

(4) Notwithstanding anything in this section, the Board may, in addition to or in substitution for the publication of any tariff required by this section, by regulation or otherwise, determine and prescribe the manner and form in which any such tariff shall be published or kept open by the company for public inspection, and may exempt from any such publication any competitive tariffs, or any joint tariff for traffic carried by any continuous route,—

Power of
Board as to
publication
of tariffs.

Exemptions.

- (a) operated by two or more companies, whether Canadian or foreign, from a point in Canada through a foreign country into Canada, or from any point in Canada to a foreign country; or,
- (b) owned or operated by any two or more companies, whether Canadian or foreign, from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country. R.S., c. 37, s. 339. Am.

From
Canada.

From
foreign
countries.

Former section 339 amended in sub-sec. (b) by omitting the words "as soon as possible" after "freight tariffs" in the fourth line and substituting "also."

This section is similar to section 6 of the I.C. Act, providing that the freight and passenger tariffs must be

posted up in two public and conspicuous places in every depot, station, or office where passengers or freight respectively are received for transportation, in such form that they can be accessible to the public. A practice seems to have prevailed in the United States of stating the place where such tariffs could be seen. This, it was decided, was not a compliance with the Interstate Commerce Act: **Rea v. Mobile & Ohio Ry Co.**, 7 I.C.C. 43; **Johnson v. Chicago, St. P. etc., Ry. Co.**, 9 I.C.C. 221. It has been adopted in this section, however, as more convenient, as such tariffs in practice are frequently removed unless kept in a secure place.

In the same section of the Interstate Commerce Act, all terminal charges, storage charges, icing charges, and all other charges which the Commission requires, are required to be stated separately in the schedules or tariffs of rates and charges for the transportation of property. In this Act the interpretation clause, section 2 (32), "toll" or "rate" includes such charges, but there is no particular provision requiring these to be separately specified.

Sub-sec. 11 of sec. 6, I.C. Act, requires the carrier to furnish a written statement upon written request of the rate applicable to a described shipment between stated places and provides a penalty of \$250 recoverable by action in case of refusal or mis-statement of such rate or if the person or company making such request suffers damage in consequence thereof.

This provision seems to have been suggested by such cases as **Texas Pacific Ry. Co. v. Mugg**, 202 U.S. 242, and the other cases discussed under sec. 323 *q.v.* It is not contained in this Act. It is the duty of the shipper equally with the railway agent to acquaint himself with the relevant rate and the mistake of the latter in quoting the rate does not relieve the former of payment of the toll properly chargeable under the tariff applicable to the shipment. The tariffs filed with the Board and posted pursuant to this section are open to public inspection and shippers are in a position to inform themselves of the proper rates and must be assumed to know them: **Canadian Condensing Co. v. C.P.R.**, 12 C.R.C. 1.

The effect of shipping at a lower rate than that authorised by the tariff, would be an unjust discrimination in favor of the shipper which is forbidden in express terms by the Act, sec. 314, which provides for equality of treatment. See **Hodgins, J.A., in Watson v. C.P.R.**, 19 C.R.C. at p. 164, 20 D.L.R. 472.

Presumption as to Legal Tolls.

343. If the company files with the Board any tariff and such tariff comes into force and is not disallowed by the Board under this Act, or if the company participates in any such tariff, the tolls under such tariff while so in force shall, in any prosecution under this Act, as against such company, its officers, agents or employees, be conclusively deemed to be the legal tolls chargeable by such company. R.S., c. 37, c. 78.

Tariff.

Presumed
legal as
against com-
pany.

Section 425 provides that the liability for contravention of the Act or any order or regulation of the Board shall be a penalty of not more than \$1,000 nor less than \$100.

By section 430 any departure by the company from the tolls in a tariff which is in force shall be an offence under the Act. See also sections 446 and 448 as to the Company being liable for the act or omission of its officers or agents and the procedure applicable to prosecutions for penalties.

Special Rates for Specific Shipments.

344. (1) Notwithstanding anything in this Act, the Board may make regulations permitting the company to issue special rate notices prescribing tolls, lower than the tolls in force upon the railway, to be charged for specific shipments between points upon the railway, not being competitive points, if it considers that the charging of the special tolls mentioned in any such notices will help to create trade, or develop the business of the company, or be in the public interest, and not otherwise contrary to the provisions of this Act.

Regulations
permitting.

(2) Every such special rate notice, or a duplicate copy thereof, shall be filed with the Board, and shall exist merely for the purpose of giving effect to the special rate charged for the specific shipment mentioned therein. R.C., c. 37, s. 342.

Notice to be
filed with
Board.

Former section 342.

Prior to the Railway Act of 1903, chap. 58, coming into force certain railway companies had granted a reduction of 25 per cent. in freight rates on the material for construction and machinery for equipment of new industries. The Board refused to authorise the continuance of such reductions under sub-section 4 of section 275, of the Railway Act, 1903, now this section,

It was held that although the Board is prepared to give due effect to this sub-section, a separate and distinct application must be made in each case and that such authority could not be given in general terms. **Re Canadian Freight Association & Industrial Corporations**, 3 C.R.C. 427.

An application by the Grand Trunk Ry. Co. for authority to reduce the rates on bituminous coal to a certain place, used for manufacturing purposes, by 10 cents per ton below the published rate charged to other shippers, was refused, on the ground that even if it were proved that certain manufacturers were unable to pay the high rate and carry on business successfully, the allowance of a reduction in the freight rate on any article of merchandise to one class of shippers, and the refusal of the same rate to another class, is unjust discrimination, and forbidden by section 252 (1903) now section 314. **Manufacturers' Coal Rates Case**, 3 C.R.C. 438. **Castle v. Balt. & Ohio Ry. Co.**, 8 I.C.C. 333.

Reduced Rates and Free Transportation.

For Govern-
ment, char-
ity, exposi-
tions, etc.

345. (1) Nothing in this Act shall be construed to prevent,—

- (a) the carriage, storage or handling of traffic, free or at reduced rates, for the Dominion, or for any provincial or municipal government, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the carriage, free or at reduced rates, of destitute or homeless persons, transported by charitable societies, and the necessary agencies employed in such transportation, or the carriage at one-half the regular single fare of ministers of religion or persons exclusively engaged in charitable, religious or eleemosynary work;
- (b) the issuing of mileage, excursion or commutation passenger tickets, or the carriage at reduced rates, of immigrants or settlers and their goods or effects, or any member of any organized association of commercial travellers with his baggage;
- (c) railways from giving free carriage or reduced rates to their own directors, officers, agents and

Special
tickets, im-
migrants,
commercial
travellers.

Railway
employees,
M.P.P.'s
press, etc.

employees, or their families, or to former employees of any railway, or for their goods and effects, or between points within the province to members of the provincial legislatures or to members of the press, or to members of the Interstate Commerce Commission of the United States and the officers and staff of such commission, and for their baggage and equipment, or to dependent members of the families of any persons who are entitled to free transportation under section three hundred and forty-six of this Act, and for their baggage, or to such other persons as the Board may approve or permit; or,

- (d) railways or transportation companies from exchanging passes or free tickets with other railways or transportation companies for their officers, agents and employees and their families, goods and effects, or from issuing passes or free tickets to officers and employees of the Department of Railways and Canals, or their families, and their goods and effects, or a similar interchange of passes, or franks with or by telegraph, telephone and cable companies;

Exchanging
passes, etc.

- (e) railways from giving free carriage to the Governor-General, and staff, and families, and baggage and equipment,

Governor
General.

Provided that the carriage of traffic by the company under this section may, in any particular case, or by general regulation, be extended, restricted, limited or qualified by the Board, and the Board, in or by any order or by general regulation, may prescribe the forms to be issued or used by the company for the carriage of traffic at free or reduced rates under this Act, and the terms and conditions applicable thereto, and the records to be kept by the company of all such traffic carried and of all passes, free and reduced rate transportation issued or given by the company, and shall require the making of periodical returns duly verified by affidavit to the Board in respect thereof; and it shall be the duty of the Board

Board may
regulate
carriage of
traffic and
prescribe
forms, rec-
ords and re-
turns under
this section.

to examine such returns with a view to seeing that the law has been observed.

Commutation
tickets.

(2) Whenever the Board sees fit it may require the company to grant and issue commutation tickets at such rates and on such terms as the Board may order. R.S., c. 37, s. 341; 1910, c. 50, s. 11. Am.

Former section 341, sub-section 1 has been largely amended and sub-section (2) added.

The Board has no power to extend the carriage of traffic where no question of unjust discrimination arises—the granting of tolls is permissive so far as the carrier is concerned, the jurisdiction of the Board is simply amendatory. **Town of Waterloo v. G.T.R.**, 24 C.R.C. 143.

This section is similar to section 22 of the I.C. Act with appropriate changes corresponding to the different political conditions of the two countries.

Some portions of this section in the I.C. Act have been omitted, e.g., “Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies; nothing in this Act shall prevent the issuance of joint interchangeable mileage tickets with special privileges as to the amount of free baggage.”

The intention of this section (sub-sec. 1) is to give to railway companies certain rights which may be exercised under their own discretion, subject to its provisions, and, in certain other cases, if approved and permitted by the Board, and there is no unjust discrimination. Board’s ruling in *re Express Franks*, 19 January, 1920.

By general order No. 274, 20 November, 1919, railway companies were permitted by the Board to carry free certain officials of the Dominion Government, Provincial fire rangers, families of former and deceased employees of railways and former employees of transportation companies and their families.

In the *Brampton Commutation Case*, **Wegenast v. G. T.R.**, 8 C.R.C. 42 and 168, the Company was held to be within its rights under this section in issuing reduced fare tickets between Toronto and Oakville, a distance of 21 miles, on a different line of railway, and refusing to

issue such tickets between Toronto and Brampton, a distance of 21.14 miles; it was held in that case that no unjust discrimination against Brampton and in favor of Oakville had been proved.

In a subsequent case, **City of Toronto and Town of Brampton v. G.T.R. & C.P.R.**, (Brampton Commutation Case No. 2), 11 C.R.C. 370, the City of Toronto applied for an order under former sections 315, 317, 323, 341 and 77, now sections 314, 316, 324, 345 and 319, compelling both Railway Companies (G.T.R. and C.P.R.), to cease discriminating unjustly between certain towns adjacent to the city as to commutation passenger tickets between such towns and city. The Railway Companies contended that under this section the granting of such commutation rate was a matter absolutely in the discretion of the company, and that such discrimination is not controlled by section 77 or any other section of the Act. In a special case submitted for the opinion of the Supreme Court it was decided that section 77 applied—11 C.R.C. 365 and the application was refused, followed in **Massiah v. C.P.R.**, 17 C.R.C. 88. After the addition of sub-sec. 2 another application by the City of Toronto and neighboring municipalities to the Board to extend the commutation passenger fares to other areas was refused.

It was held that the applicants must make out not only a **prima facie** case, but must satisfy the Board that it should exercise its discretion. It must be shown by affirmative evidence that unjust discrimination exists between persons or localities. **Re Commutation Rates Case**, 25 C.R.C. 409. The Board has no jurisdiction to compel the issuance of excursion rates or fix the number or persons entitled thereto. **Canadian Fraternal Association v. Canadian Passenger Association**, 13 C.R.C. 178, followed in **Roy v. Can. Pass. Assn.**, 17 C.R.C. 320.

Sec. 345 (b) Settlers' Effects.

The Board has held that general goods cannot be carried as settlers' effects; the exceptional toll only applies to the actual possessions of persons moving from the east to the west with a view to living there and the tariff is to be strictly enforced in that regard. **In re Settlers' Effects**, 19 C.R.C. 387. In **Watson v. C.P.R.**, 19 C.R.C. 161, 20 D.L.R. 472, 32 O.L.R. 137, the Ontario Appellate Division held a contract in respect of settlers' effects made by a railway agent for lower than ordinary rate to be within the apparent scope of his authority, and that it is permissible under this sub-section to make a specific bargain to carry one lot of such goods at a reduced rate.

The low rate quoted inadvertently was held not to be illegal as an unjust discrimination and where a higher rate exacted at destination than originally quoted was paid under protest it could be recovered back. For criticism of this decision as disregarding the provisions against unjust discrimination, see notes to 19 C.R.C. 161 at p. 165.

Members of
Parliament
and Board,
etc., free.

346. Members of the Senate and House of Commons of Canada, with their baggage, and members of the Board and such officers and staff of the Board as the Board may determine, with their baggage and equipment, shall, on production of cards, certifying their membership or right, which shall be furnished them by the Clerk of the Senate or the Clerk of the House of Commons or the Secretary of the Board, as the case may be, be entitled to free transportation on any of the trains of the company; and the company shall also, when required, haul free of charge any car provided for the use of the Board. R.S., c. 37, s. 343. Am.

Former section 343 re-drafted with the provision added as to production of cards by members of the Senate and House of Commons.

No free
passes, ex-
cept as above
provided.

347. Subject to the provisions of sections three hundred and forty-five and three hundred and forty-six of this Act, no company shall hereafter, directly or indirectly, issue or give any free ticket or free pass, whether for a specific journey or periodical or annual pass, and no company shall otherwise arrange for or permit the transportation of passengers except on payment of the fares properly chargeable for such transportation under the tariffs filed under the provisions of this Act, and at the time in effect: Provided that nothing in this Act shall affect the furnishing of free transportation where such is specifically required by any other public general Act of the Parliament of Canada. **New.**

Contracts, etc., Limiting Carriers' Liability.

Contracts,
etc., impair-
ing carriers'
liability.

348. (1) No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless

such class of contract, condition, by-law, regulation, declaration or notice has been first authorised or approved by order or regulation of the Board:

(2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

Power of Board.
/

(3) The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

Board may prescribe terms.

(4) Railway companies shall print in both the English and French languages the bills of lading that are to be used along their lines within the limits of the province of Quebec. R.S., c. 37, s. 340; 1909, c. 32, s.14. Am.

Bills of lading to be in French and English in Quebec.

Former section 340, sub-section 4 is an amendment.

This section was introduced by the Act of 1903; it should be read with section 312 (7). In the notes to section 312 there is a full discussion of the classes of cases in which contracts may be made limiting the company's liability. Such contracts must now be first approved by the Board.

Canadian Freight Classification No. 16, effective 1st March, 1913, contains a number of "Rules and Conditions of Carriage" with regard to such contracts, some of which are here noticed.

By Rule 7 "Owner's risk" articles shown by the classification to be carried at owner's risk of weather (i.e., O. R.W.) or otherwise, as the case may be, shall, unless otherwise required by the shipper, be carried at owner's risk as so specified and defined and no special notation to that effect shall be necessary on the bill of lading; the risks intended to be covered by this condition are those necessarily incidental to transportation but not to release the carrier from liability for negligence. Should the shipper decline to ship at "owner's risk" as specified in the classification, the articles will be carried subject to the terms and conditions of the bill of lading approved by the Board at 25 per cent in addition to the rates which would be payable if shipped at "owner's risk," except live stock for which special provision is made.

Forms of "straight" and "order" bills of lading was approved by the Board's order No. 7562, of 15th July,

1909 under the authority of former section 340. In general the railway company is an insurer. The limitations of its liability are specifically set out. It is given the benefit of the various defences at common law, viz.: an act of God or of the King's enemies, or of public authority (e.g., quarantine) or of the shipper, inherent vice or defect in the goods, subject to the condition that the negligence of the carrier did not concur therein. Under the form of bill of lading in use before 1909 the company assumed no liability off its own lines, where it acted only as the agent of the owner. Under the present bill of lading in case of carriage of goods from one point to another in Canada, or where goods are carried on a joint tariff, the initial carrier is liable in respect of any loss or damage occurring on the lines of the connecting carrier and from which such connecting carrier is not relieved under the provisions of the bill of lading, the onus being on the initial carrier. The latter is entitled to recover from the connecting carrier, but the party aggrieved retains any right of action he may have against the initial or connecting carrier. The carrier is given the benefit of any insurance on goods lost or damaged on reimbursing to the insured the premiums paid. There are many special provisions, e.g., as to giving notice of arrival to the consignee, and as to the railway's liability being that of a warehouseman only when 48 or 72 hours have elapsed from the giving of such notice.

The provisions of the previous live stock Transportation Contract approved by the Board under sections of the Railway Act similar to section 348 were upheld in **Mercer v. C.P.R.**, 8 C.R.C. 372, 17 O.L.R. 585; **Sutherland v. G.T.R.**, 8 C.R.C. 389, 18 O.L.R. 139; **Heller v. G.T.R.**, 13 C.R.C. 367, 25 O.L.R. 488; **G.T.R. v. Robinson**, 19 C.R.C. 37, 22 D.L.R. 1, (1915), A.C. 740; **C.P.R. v. Parent**, 20 C.R.C. 141, 33 D.L.R. 12, (1917) A.C. 195. Its terms have since been materially altered by the Board's judgment of 1st June, 1920, approving a new form of the bill of lading for the transportation of live stock effective 1st July, 1920, see 26 C.R.C. 101. Substantial increases are made in the schedule of valuations per head of live stock carried, the valuation per carload is abolished; the carrier's liability is restricted to injuries sustained by the carrier's negligence while the attendant is in the caboose or the live stock car, and by the terms of a special contract which must be signed by attendants as a condition precedent to their right to ride free or at reduced rates, the carrier is made liable for its portion of the through route only and

not for default of connecting carriers "except as such liability is or may be imposed by law."

Carrying Dangerous Commodities.

349. (1) No passenger shall carry, nor except in conformity with any order or regulation made by the Board in that behalf, shall the company be required to carry upon its railway, gunpowder, dynamite, nitroglycerine, or any other goods which are of a dangerous or explosive nature.

Dangerous
goods.

(2) Every person who sends by the railway any such goods shall distinctly mark their nature on the outside of the package containing the same, and otherwise give notice in writing to the station agent or employee of the company whose duty it is to receive such goods and to whom the same are delivered. R.S., c. 37, s. 286. Am.

Nature must
be marked
outside.

Former section 286 amended by adding the words in the first and second lines "except in conformity with any order or regulation made by the Board in that behalf."

For penalties see section 432, *post*. In the Act of 1888 the words "in the judgment of the company" preceded the words "are of a dangerous nature," but these words were omitted in the Act of 1903 and later Acts, so that it is a question of fact in each case whether the goods are of a dangerous nature.

Somewhat similar, but more elaborate legislation exists in England under 38 Vict., cap. 17, secs. 35, 36 and 37.

As to carriage of explosives by express not being obligatory see **Canadian and Dominion Express Cos. v. Commercial Acetylene Co.**, 9 C.R.C. 172.

Apart from statute it was held by a majority of the Court in **Brass v. Maitland**, 6 E. & B. 470, that there is an implied undertaking on the part of shippers of goods by sea that they will not deliver packages of a dangerous nature, the character of which the carrier's servants may not reasonably be expected to know without expressly giving notice that they are of a dangerous nature, and if they do so they will be liable to the carrier for any damages which he may have to pay other shippers on account of injury done to their goods, by the dangerous article. At common law, at least, such want of knowledge would not relieve a carrier of goods from liability to other shippers whose goods were injured, but he is left to his rem-

edy over: **Brass v. Maitland**, *supra*, followed in **Bamfield v. Goole** (1910) 2 K.B. 94. As a carrier of passengers is only liable for negligence and is not an insurer he would not, however, be liable for an accident due to explosives carried into a car by another passenger without his knowledge and in the absence of circumstances which ought to have aroused his suspicion: **East Indian Ry. Co. v. Kalidas** (1901), A.C. 396. Where the defendant by his agent delivered a carboy of nitric acid to the plaintiff for carriage and the agent failed to disclose its dangerous character, the plaintiff was allowed damages caused by the carboy breaking and the acid injuring him: **Farrant v. Barnes**, 11 C.B.N.S. 553. In that case, Willes, J., at p. 563, says: "I apprehend that as a matter of legal duty a person who gives another dangerous goods to carry, goods which require more care and caution than ordinary merchandise and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such a notice;" see also **Hearne v. Garton**, 28 L.J. Mag. Cas. 216. These doctrines were applied to a case of a shipowner carrying contraband goods and the Court of Appeal in England laid it down that "the carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers is a breach of duty toward them, and the shipowner is liable for damages for delay in delivering their goods at the port of destination, if the ship is seized and detained by reason of having enemies' goods on board"; **Dunn v. Bucknall** (1902), 2 K.B. 614. See also **Rex v. Michigan Central R.W. Co.**, 10 O.W.R. 660.

Carrying
regulated by
Board.

350. (1) The Company shall not carry any goods of an explosive or dangerous nature except in conformity with the regulations made by the Board in that behalf.

Suspected
parcels.

(2) The Company may refuse to take, except in conformity with any order or regulation made by the Board in that behalf, any package or parcel which it suspects to contain goods of an explosive or dangerous nature, or may require the same to be opened to ascertain the fact. R.S., c. 37, s. 287. Am.

The penalty for non-compliance with the provisions of this section is to be found in sec. 411, *post*.

In **Rex v. Michigan Central R.R. Co.**, 10 O.W.R. 660,

where negligence in the carriage of dynamite was shewn to have caused an explosion in which two persons were killed and many injured, the Board having refused the consent required by section 431, sub-section 4, **post**, to a prosecution of the Railway Company under this section, the defendants were indicted under the provisions of the Criminal Code.

Carrying His Majesty's Mail and Forces.

351. His Majesty's mail, His Majesty's naval or military forces or militia, and all artillery, ammunition, provisions or other stores for their use, and all policemen, constables or others travelling on His Majesty's service, shall, at all times, when required by the Postmaster General of Canada, the Minister of Militia or the Deputy Minister of Militia, or any person having the superintendence and command of any police force, respectively, be carried on the railway, and with the whole resources of the company if required, on such terms and conditions and under such regulations as the Governor in Council makes. R.S., c. 37, s. 289. Am.

Carriage of
mails,
troops,
equipment,
etc.

Regulations.

Former section 289 amended by substituting "the Minister of Militia or the Deputy Minister of Militia" for "the commander of the Forces" in the former section.

Similar legislation respecting the use of the railway for military purposes exists in England, under 34 and 35 Vic., cap. 86, and the carriage of the mails is governed by 36 and 37 Vic., cap. 48, secs. 18, 19 and 20, and 56 and 57 Vict., cap. 38.

In **Spence v. G.T.R.**, 27 O.R. 303, it was proved that the post office authorities had provided facilities in a postal car for mailing letters on a train and the plaintiff in order to avail himself of these facilities, went to defendant's station to post a letter and, in doing so, while the train was moving out, fell over an obstruction on the station platform and was hurt, a non-suit having been granted by the trial Judge, his decision was affirmed on appeal as the plaintiff had no invitation from the railway to go upon its premises and was a bare licensee. The arrangements made by the post-office for receiving letters were not looked upon by the Court as equivalent to an invitation by the railway.

Checking Passengers' Baggage.

352. (1) A check shall be affixed by the company

Company to
affix checks.

to every parcel of baggage, having a handle, loop or suitable means for attaching a check thereupon, delivered by a passenger to the company for transport; and a duplicate of such check shall be given to the passenger delivering the same.

Excess
baggage.

(2) In the case of excess baggage the company shall be entitled to collect from the passenger, before affixing any such check, the toll authorised under this Act. R.S., c. 37, s. 283.

Former section 283, see section 220 (1903) and section 250 (1888).

A penalty of eight dollars, recoverable in a civil action, for refusal to comply with this section is imposed by section 434.

Checks. The system of checking baggage, which exists in Canada under the present statute, and in the United States: **Meux v. Great Eastern Ry. Co.**, 2 Am. & Eng. Ry. Cas. (N.S.) 464, and notes, does not exist in England, and the difference between the practice in the two countries is described by Draper, C.J., in **Gamble v. G.W.R.**, 24 U.C.R. 407, at p. 413. The majority of the Court in that case considered that our system did not alter the character of the responsibility as it existed under the English cases, and they looked upon checks "only as additional precautions taken by the company beyond what is customary in England in order to prevent the baggage from being given up to the wrong person." From this view, Morrison, J., dissented, considering that the system of checking is in fact "a notice to passengers that all articles of luggage which they do not desire or prefer to keep under their own personal care and at their own risk, must be checked or handed to the company's officers."

The view of the majority of the Court was, however, upheld on appeal: 3 Error and Appeal, 163. Checks are, nevertheless, evidence that the baggage has been received by the carrier, and lay upon him the onus of showing that it has not been received: 3 Wood on Railways, p. 403; but it is not conclusive against him, and he may tender evidence to show, that, notwithstanding the possession of the check, the holder has received the article sued for: **Stimpson v. New England, etc., Steamship Co.**, 3 Geld & Oxley (Nova Scotia) 184. Where, in the course of a continuous journey a passenger gave up his check to an omnibus agent who was to transport him across Buffalo in order to reach another train, by which he was to complete his

journey, and the conductor had told him that this was the proper course, he was permitted to recover from the company issuing the check the value of his baggage which was lost by the omnibus line: **Smith v. G.T.R.**, 35 U.C.R. 547.

Nature of Liability. The company are common carriers, and liable as such when they undertake to carry a passenger and his personal luggage for hire: **Macrow v. G.W.R.**, L.R. 6 Q.B. 612; **Cohen v. South Eastern R.W. Co.**, 2 Ex. D. 253; 259; **Gamble v. G.W.R.**, 24 U.C.R. 407; 3 Error and Appeal, p. 163; but where the passenger, instead of delivering his baggage to the company to be checked and carried in the baggage car, retains it in his own possession at his own request, "the company are not liable for any loss or injury occurring during its transit to which the act or default of the passenger has been contributory:" **G.W.R. v. Bunch**, 13 A.C. 31. If, however, the baggage retained by the passenger is lost, not through his own neglect but through the carelessness of a railway porter who has undertaken to watch it, the plaintiff may recover on the ground of the defendants' negligence: **G.W.R. v. Bunch**, *supra*, disapproving of the reasoning in **Bergheim v. Great Eastern R.W. Co.**, 3 C.P. D. 221, to the contrary. See **Steers v. Midland Ry. Co.**, 36 T.L.R. 703. The rule laid down in the **Bunch Case** was applied in **Gamble v. G.W.R.**, *supra*; but in an American case, where the passenger had taken his overcoat into a car with him and lost it, the Court held that "the overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers:" **Tower v. Utica, etc., Ry. Co.**, 7 Hill (N.Y.) 47; and in Quebec, where an overcoat carried by a passenger on a steamboat, was left by him in the saloon while he was at his supper, and was lost, the carrier was excused, and **Gamble v. G.W.R.** was distinguished: **Torrance v. Riche-lieu & Ontario, etc., Co.**, 10 L.C. Jur. 335.

Limitation of Liability.

The liability of a railway company as a common carrier for loss of personal baggage is now governed by General Order No. 151 of the Board dated 8 November, 1915, rule 1 (a) defines personal baggage as consisting "of wearing apparel, toilet articles and similar effects for actual use and necessary and appropriate for the wear, use, comfort and convenience of the passenger for the purposes of the journey and not intended for other persons or for sale. Rule 3 (b) provides that the carrier shall not be liable for the loss of personal baggage for an amount in excess of \$100, unless

a greater value is declared and extra charges paid at the time of checking. This order was duly published in the **Canada Gazette** and by section 50 (former section 32), while it remains in force has the like effect as if enacted in the Act itself. The power of the Board so to limit the liability of the company under secs. 34 (1) and 348 (3) former sections 30 (h) and (i), and 340 (3) was upheld by Rose. J., in **Sherlock v. G.T.R.** (1920) 47 O.L.R. 473, affirmed by Ontario Appellate Division, 48 O.L.R. 237, and by the Supreme Court of Canada, June, 1921, 62 S.C.R. 328, distinguishing **Spencer v. C.P.R.**, 13 D.L.R. 836, 16 C.R.C. 207, 29 O.L.R. 122. In this case it was held that if the articles in the trunk which was delivered to the company and accepted as "personal baggage" were not "personal baggage" in fact, the Company was under no liability at all. While the check contained the above conditions limiting liability, this decision does not rest upon contract but upon the General Order of the Board, and the decision in **Bate v. C.P.R.**, 18 S.C.R. 697, that a passenger is not bound by conditions which did not come to her knowledge as in the **Spencer Case**, is no longer an authority.

Where railways undertake to keep baggage in a cloak-room till required, and exact no conditions limiting their responsibility, they will be liable as bailees for the full value of goods lost through their negligence; but, **semble**, they would not be bound by section 312 of this Act, and being mere bailees, might by contract undertake to keep articles till called for, and yet provide that they shall assume no liability, or only a limited liability therefor: **Pratt v. South Eastern R.W. Co.** (1897), 1 Q.B., 718; **Harris v. Great Western R.W. Co.**, 1 Q.B.D. 515; **Dorion v. G.T.R.**, Q.R. 53 S.C. 106; **Gibaud v. G.E. Ry. Co.** (1921), 2 K.B. 426.

Railway companies sometimes carry goods and passengers by water, and in such cases section 312, **post**, may not apply: **Abdou v. Canadian Pacific R.W. Co.**, 4 C.R.C. 56. By R.S.C., cap. 113, provision is made for regulating the liability of carriers by water, and by section 966 of that statute it is provided that such carriers shall be liable for loss of or damage to personal baggage of passengers carried on their vessels, but that such liability shall not exceed \$500 unless the true value of the goods is declared. By virtue of this section, a condition in a contract made with shipowners limiting liability for personal baggage to \$100 was disregarded, and judgment was given for \$500, the goods themselves being worth \$655: **Wensky v. Can. Development Co.**, 8 B.C.R. 190.

When Liability Begins. The liability of the company begins when the baggage is delivered to its servants for the journey, though the train may not start for a considerable time: **Lovell v. London, etc., Ry. Co.**, 45 L.J.Q.B. 476; and where luggage is left with a porter to be placed in plaintiff's compartment and is lost before being put on board, the defendants are liable if the circumstances show that it was entrusted to the porter for the purposes of transit, and was not merely being taken care of by him while the journey was suspended: **Bunch v. G.W.R.**, 17 Q.B.D. 215, 13 A.C. 31; **Welch v. London, etc., Ry. Co.**, 34 W.R. 166.

Where a person in charge during the temporary absence of the proper officer receives baggage from an intending passenger on board a vessel, the vessel owners become liable: **Morrison v. Richelieu, etc., Co.**, 5 L.N. 71; and in a somewhat similar case, where the defendants' police officer received baggage several hours before the train started, the plaintiff recovered its value: **Tessier v. G.T.R.**, 3 Rev. Leg. 31.

When Liability Ceases. Generally a railway company's duty as common carrier of baggage ceases when it has been placed on the platform and the owner has had a reasonable time to remove it: **Penton v. G.T.R.**, 28 U.C. R. 367; it is the owner's duty to call for his baggage within a reasonable time, and if he deliberately leaves it with the company until the next day to suit his own convenience, the company would be no longer liable as common carriers, but the plaintiff's claim, if any, would be against the defendants as bailees or warehousemen only, and they would not be liable unless negligence was shewn: **Vineberg v. G.T.R.**, 13 A.R. 93.

In **Hamel v. G.T.R.**, 2 O.W.N. 1286 an interval of four hours was held not sufficient to change the status of the defendants from carriers to warehousemen when they knew the plaintiff was coming by another train on a later day.

If instead of leaving the luggage on the platform to be taken away by the owner, the carrier provides porters to take it to the vehicle which conveys it away, his liability lasts till the porters have performed their duty: **Patscheider v. G.W.R.**, 3 Ex. D. 153; **Richards v. London, etc., Ry. Co.**, 7 C.B. 839. If, in England, a porter takes charge of the luggage while the owner goes away, intending to send for it, the company's liability is at an end; **Hodkinson v. London, etc., Ry. Co.**, 14 Q.B.D. 228; and

where, instead of complying with the company's by-laws and leaving his luggage in the cloak room till called for, the passenger left it in charge of a porter to be sent after him in an omnibus, he could not recover: **Smith v. G.W.R.**, 62 L.T. 194; and in Manitoba the railway company successfully defended an action for baggage which had been deposited at the station at which the passenger alighted, but not being claimed by him in due time, had been lost, and it was considered that, as the defendants had not charged storage and were not entitled to charge it, they were not liable as warehousemen: **McCaffrey v. C.P.R.**, 1 Man. L.R. 350. The "reasonable time" to be given to the passenger for taking away his baggage depends upon circumstances, such as the quantity of baggage, the number of people demanding baggage, and the facilities afforded for handling it: Abbott on Railways, p. 353; **Hogan v. G.T.R.**, 2 Q.L.R. 142; **Kellert v. G.T.R.**, 22 L.C. Jur. 257. While the law in Quebec under these cases appears to be substantially similar to the law in Ontario and Manitoba under the **Penton, Vineberg, and McCaffrey** cases, the more recent decision of **Pellant v. C.P.R.**, Mont. L.R. 7 S.C. 131, Q.R. 1 Q.B. 311, appears to extend their liability for baggage which has been left unclaimed for over twenty-four hours. For a discussion of this case, see Abbott on Railways, pp. 356, 357. Where a steamship company undertook to keep its passengers' baggage until it was examined by the Customs authorities, the contract of carriage is not ended until the examination is completed and a reasonable time thereafter has elapsed to enable the owner to claim his goods: **Davidson v. Canadian Shipping Co.**, 19 Rev. Leg. 558, Q.R. 1 Q.B. 298. Where baggage is unaccompanied by its owner the carrier is only liable as a gratuitous bailee. **Carlisle v. G.T.R.**, per Riddell, J., 20 O.W.N. 820.

Sleeping Car Companies. There are many cases in the United States in which the liability of these companies for goods lost while on their cars has been considered. Some of them are collected in an article on the liability for passengers' luggage in 2 Am. & En. Ry. Cas. (N.S.) 1, and the subject is dealt with at some length in Abbott on Railways, pp. 357, *et seq.* If the passenger is awake and sitting up, able to look after his own effects, there would apparently be no difference between the case of a parlour car company and any other company, and the rule enunciated in **G.W.R. v. Bunch**, 13 A.C. 31, which has already been dealt with, would govern: **Whitney v. Pullman Car Co.**, 143 Mass. 243; but where a sleeping car company invites persons to come in and go to sleep,

thus rendering themselves incapable of taking care of their own property, different considerations apply, for "when you have gone to sleep, of course, you can't take care of yourself. Everybody knows that, and for that very reason, and the fact that the company notifies you to lie down and shut your eyes and go to sleep, and thus become helpless, it is their duty to take care of you while you do sleep; not that they are insurers, nor that they say you shall not be robbed, but that they will use reasonable and ordinary care to prevent people intruding upon you and picking your pockets or carrying off your clothes while you are asleep": **Pullman Car Co. v. Gardner**, 3 Pennypacker, (Penn.) 78; Albany Law Journal, 1884, pp. 8 and 9. It is the duty of such a company to keep a person on guard all night: **Pullman Car. Co. v. Law**, 30 Cent. L.J. 345; **Carpenter v. New York, etc., Ry. Co.**, 124 N.Y. 53. These decisions have been followed and approved in Ontario in **Stearn v. Pullman Co.**, 8 O.R. 171, which, however, decided that where a passenger on defendants' cars, before going to sleep, put his pocket book under his pillow and in the morning it was gone, he could not, without proving some negligence on defendants' part, recover, as they were not liable as insurers, and in any case it could hardly be said that there was any delivery of the pocket book into their custody. In the cases already quoted an attempt has been made to impose upon sleeping car companies the same liability as innkeepers, but this has generally failed. In Quebec, however, in **Sise v. Pullman Car Co.**, Q.R. 1 S.C. 9, the trial judge considered that they were innkeepers and subject to the liability imposed by Quebec law upon that class of bailees; but, on appeal, the Court of Queen's Bench held that there was evidence of negligence, and on that ground affirmed the Superior Court judgment, without expressing any opinion upon their status: **Pullman Car Co. v. Sise**, Q.R. 3 Q.B. 258.

Who May Sue. If a servant carries his master's livery in his luggage, even though the contract to carry him and his luggage is with him and not with the master, yet the latter may sue for damages done to such livery or to other personal baggage lawfully on the railway premises or trains when lost: **Meux v. Great Eastern Ry. Co.** (1895), 2 Q.B. 387; and a servant whose fare has been paid by his master, may sue for damages to his personal baggage which he is carrying with him: **Marshall v. York, etc., Ry. Co.** 11 C.B. 655; and an officer who is carried under a contract with the Government may sue for the loss of his effects: **Martin v. Great Indian, etc., Ry. Co.**,

L.R. 3 Ex. 9; but a person who sends his own luggage upon a ticket bought by the servant, cannot recover, because the liability is, subject to what has been already said, only to the passenger whose luggage it appears to be: **Becher v. Great Eastern Ry. Co.**, L.R. 5 Q.B. 241.

The plaintiff, one of fifty-four Chinamen travelling over the defendants' railway on one ticket purchased on their behalf by an employment agent, who received the price of his passage from each passenger out of wages earned by him after reaching his destination, was held entitled to recover for his personal baggage destroyed on the ground that the contract was with each Chinaman for the safe carriage of himself and his baggage. **Chan Dy Chea v. Alberta Ry. Co.**, 6 Terr. L.R. 175.

What Constitutes Baggage. See also "Limitation of Liability," p. 627, *supra*. Railway companies are only bound to check and carry free passenger's **luggage**, (the fare being paid in respect of the carriage of the passenger and his luggage. **Casswell v. Cheshire Lines Committee** (1907) 2 K.B. 499 at p. 506) and are only liable for such articles so carried and lost or damaged as are properly comprehended in that term. In **Great Northern Ry. Co. v. Shepherd**, 8 Ex. 30, a case where ivory handles, intended for sale, had been carried and lost, Parke B., says p. 37: "In this case, there being no special contract, the defendants were bound to carry the plaintiff and his **luggage**, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present or a book for his journey might be included in the term; but certainly not merchandise or material bought for the purpose of being manufactured and sold at a profit." This case was followed in **Shaw v. G.T.R.**, 7 U.C.C.P. 493, where it was said that though articles carried for convenience or amusement, such as a gun or fishing tackle, might fall within the term, a quantity of gold pens and pencils intended for sale would not be included. If it can be shown, however, that the company actually knew the character of the goods tendered as baggage, and accepted them with such knowledge, they would be liable for their loss: **Great Northern Ry. Co. v. Shepherd**, *supra*. It is not enough to show that there was some indication on the parcel or trunk from which the character of the goods could be inferred, as where a trunk was of a particular kind known as a commercial traveller's trunk, nevertheless the company was not liable: **Packard v. C.P.R. Co.**, Mont. L.R. 5 S.C. 64; or where a parcel tendered as bag-

gage was labelled "glass:" **Cahill v. London, etc., Co.**, 13 C.B.N.S. 818; or rare plants intended for sale were marked "plants, perishable": **Lee v. G.T.R. Co.**, 36 U.C.R. 350. It follows from what has been said, that a commercial traveller's samples carried in a trunk will not be treated as baggage unless the company, knowing what it contains, allows it to be carried free: **Canadian Navigation Co. v. Hayes**, 19 L.C. Jur. 269; **Wilkinson v. Lancashire, etc., Ry. Co.**, (1907), 2 K.B. 222; but a hamper containing provisions intended as a present was held to be personal baggage: **Case v. London, etc., Ry. Co.**, Law Jo., Jan. 3, 1880, p. 9. The following articles are not baggage or luggage: Merchandise: **Belfast, etc., Ry. Co. v. Keys**, 9 H.L. 556, and other cases. Deeds and money belonging to a client, carried by a solicitor for use in a law suit, nor a man's own title deeds: **Phelps v. London, etc., Ry. Co.**, 19 C.B.N.S. 321, and see **Thomas v. G.W.R.**, 14 U.C.R. 389. Sheets, blankets and quilts: **Macrow v. G.W.R. Co.**, L.R. 6 Q.B. 612, but a pair of sheets for use on the journey may well be personal luggage: **McCaffrey v. C.P.R. Co.**, 1 Man. L.R. 350. An artist's pencil sketches: **Mytton v. Midland Ry. Co.**, 28 L.J. Ex. 385. A large rocking horse: **Hudston v. Midland Ry. Co.** (1869), L.R. 4 Q.B. 366. An invalid chair: **Cusack v. London, etc., Ry. Co.**, 7 Times L.R. 452. A bicycle: **Britten v. Great Northern Ry. Co.** (1899), 1 Q.B. 243; but see **Gormully v. Midland Ry. Co.**, 14 Times L.R. 84. A concertina, rifle, revolver, sewing machine and carpenter's tools: **Bruty v. G.T.R.**, 32 U.C.R. 66.

The following articles were held to be baggage: Two gold chains, a locket, two gold rings and a silver pencil case: **Bruty v. G.T.R. supra**. A quantity of jewellery suitable to the passenger's station in life: **Woodward v. Allan**, 1 L.N. 458. Money sufficient for travelling expenses: **Merrill v. Grinnell**, 30 N.Y. 594. Silk dresses, petticoats, children's clothing and an opera glass: **McCaffrey v. C.P.R.**, 1 Man. L.R. 350. A dressing case, night glasses, and telescope, owned by a shipmaster: **Cadwallader v. G.T.R.**, 9 L.C.R. 169; bedding, **Chan Dy Chea v. Alberta Ry., etc. Co.**, 6 Terr. L.R. 175; but a woman's dresses in a man's trunk were not allowed as luggage: **Mississippi, etc., Ry. Co. v. Kennedy**, 41 Miss. 671; nor a man's clothes in a lady's trunk carried for her only: **McCaffrey v. C.P.R. Co., supra**. A revolver, ear defenders, binocular glasses and a flash lamp carried by an officer in the Royal Garrison Artillery in time of war, **Jenkyns v. Southampton Steam Packet Co.** (1919) 2 K.B. 135: Whether a typewriter is or is not baggage seems to depend upon the circumstances

of the passenger. Thus in Ireland the question whether a sewing machine is personal luggage has been held to depend upon whether it is carried by a lady for personal use or by a professional seamstress: **Shannon v. M.G.W. Ry.** (1898) 33 I.L.T.R. 32. Where goods are delivered as personal luggage which are not, there is no liability for such goods as there is no contract to carry them. **Gilbey v. G.N. Ry.** (1920) 36 T.L.R. 562.

The liability for baggage begins when it is received for transit by one of the company's employees authorised to receive it. If the company allows a person to act as a porter and receive and deal with luggage as only an authorised porter could be expected to do, the company cannot deny his authority. **Soanes v. London & S.W. Ry.** (1919) 35 T.L.R. 267. The porter cannot bind the company if he offers to take charge of luggage for a lengthy or indefinite period, **G.W. Ry. v. Bunch** (1888), 13 A.C. 31; it is assumed to be within his authority to take charge of it, when tendered at a reasonable time, while the passenger buys his ticket: **Leach v. S.E. Ry.** (1876) 34 L.T. 134; where luggage was with the approval of a station inspector, placed and left in a reserved sleeping compartment an hour before the train started, the company was held to have accepted it for carriage. **Steers v. Midland Ry.**, 36 T.L.R. 703. It has also been held in England that the company's liability for luggage may continue until the passenger reaches the cab found for him by the porter, and, as it were, takes control of the situation. **Butcher v. L. & S.W. Ry. Co.** (1855) 16 C.B. 13. In the case of a married woman travelling with infant children to join her husband, the husband's clothing, household effects, and the clothing of her grown up daughters cannot be classed as personal baggage. **Callan v. C.N.R.**, 19 Man. L.R. 141, nor theatrical clothing and properties: **Gilbey v. G.N. Ry. Co.**, 36 T.L.R. 562.

Passenger Employees to Wear Badges.

353. Every employee of the company employed in a passenger train or at a passenger station shall wear upon his hat or cap a badge which shall indicate his office, and he shall not, without such badge, be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, or to interfere with any passenger or his baggage or property. R.S., c. 37, s. 280.

Before an officer of the railway company can exercise the functions of his office or a conductor can demand a

Not entitled
to exercise
office with-
out badge.

ticket or eject a passenger for non-payment of his fare, this section must be complied with. It has been fully discussed in **Farewell v. G.T.R.**, 15 U.C.C.P. 427, in which case Wilson, J., after pointing out the benefits to be derived from observing its provisions says at page 442 "To avoid all this difficulty and loss and imposition, for it is as beneficial to the railway companies as it is to the public, it has been provided that the conductors and such like officers shall be provided with a badge of office, that they shall wear this badge in the hat or cap as the most conspicuous part for it to be seen, and that without this badge, the officer shall not exercise his powers nor meddle in any way with the passengers, their baggage or property. No provision could be plainer or more peremptory in its requirements and we must give effect to it, although it may not have been very properly set up in this case by the plaintiff. Its proper observance, however, will be found to be serviceable both to the companies and to the public."

Passengers Refusing to Pay Fare.

354. Every passenger who refuses to pay his fare or produce and deliver up his ticket upon the request of the conductor may, by the conductor of the train and the train servants of the company, be expelled from and put out of the train, with his baggage, at any usual stopping place: Provided that the conductor shall first stop the train and use no unnecessary force. R.S., c. 37, s. 281. Am. Expulsion.

Former section 281 amended by adding after the word "fare" in the first line the following, "or produce and deliver up his ticket upon the request of the conductor"; after "stopping place" the words "or near any dwelling house as the conductor elects" have been struck out.

For corresponding but somewhat dissimilar provisions in England, compare 52 and 53 Vic., cap. 57 (Imp.), sec. 5.

Legal Effect of Tickets. As a general rule the ticket which an intending passenger buys, is the entire evidence of the contract between him and the carrier: **G.W.R. v. Pocock**, 41 L.T.N.S. 415, and it is therefore more than a mere receipt for the fare, though the opinion of Lord Hatherly in **Henderson v. Stevenson**, L.R. 2, H.L. Sc. 470, leaned to the opposite view. A person who had bought

a return ticket from one point to another, attempted, instead of returning to his starting point, to go somewhere else on the ground that the fare was no more than he had paid for his return trip; but the Divisional Court in the **Pocock Case**, decided that the ticket was evidence of the contract between the parties, and the purchase of it was limited by its terms and conditions to a certain route only, to which he must strictly conform. In **London, etc., R.W. Co. v. Hinchcliffe** (1903) 2 K.B. 32, we find an instance of other documents beside the ticket and its conditions being incorporated into the contract, for there the railway company's rules contained in its time tables, were held to be also binding on the purchaser. In the notes to section 302, *ante*, other instances are also given of conditions contained in the time tables being treated as part of the contract.

Before considering the binding effect of conditions appearing on tickets from the point of view of contract, reference may be made to some points of general interest.

Copyright. First, it may be mentioned that under Canadian copyright law, a ticket cannot be made the subject of copyright: **Griffin v. Kingston & Pembroke Ry. Co.**, 17 O.R. 660.

Scalping Tickets. Next, by R.S.C., 1906, chap. 38, sec. 10, it is a criminal offence in Canada for any one who is not a duly authorised agent to sell any ticket, and by section 8 any one holding an unused ticket or portion of a ticket is entitled to demand a refund for it, and by section 9 any one travelling upon a single journey ticket within the time limited, is entitled to demand from the conductor the privilege of stopping over at any intermediate station, and the time for travelling by it may be extended two days for every fifty miles of the journey to be performed.

Right to Eject. Where a ticket is lawfully demanded, section 354 gives a right to eject a passenger who refuses to pay his fare, or, having lost it, is unable to produce his ticket; provided the latter is put off at a usual stopping place after the train is stopped; but no unnecessary force may be used. This clause includes the case of a passenger getting on a train without a ticket and declining to pay his fare on the ground that he has not decided how far he is going. The conductor is entitled to know at once where the passenger is going and whether he can pay for his trip, and in the case mentioned, the pas-

senger did not mend matters by declaring his destination when ejected, tendering a \$20 gold piece and demanding the change, less \$1.35, the fare to destination: **Fulton v. G.T.R.**, 17 U.C.R. 428; nor is the fact that a passenger had bought a ticket from the agent before starting, but had lost it, any excuse for refusing to pay when demand was made by the conductor: **Duke v. G.W.R.**, 14 U.C.R. 369 and 377, and in **Beaver v. G.T.R.**, 22 O.R. 667, 20 A.R. 476, and **G.T.R. v. Beaver**, 22 S.C.R. 498, it was finally decided by the Supreme Court of Canada, reversing the Lower Courts, that the contract between the person buying a railway ticket and the company on whose line he is travelling implies that the ticket shall be produced and delivered up to the conductor of the train belonging to the company from which the ticket was purchased, and if he is unable or refuses to so produce and deliver it up he cannot bring an action if ejected.

Beaver's Case was distinguished in **Haines v. G.T.R.**, 16 C.R.C. 359, 15 D.L.R. 174, 29 O.L.R. 558. A passenger who had lost his "hat check" given him by the conductor on surrendering his ticket is not liable to expulsion from the train in default of paying another fare.

This distinguishes the Canadian cases from such English authorities as **Butler v. The Manchester & Sheffield Ry. Co.**, 21 Q.B.D. 207, where a passenger was ejected for non-payment of his fare and recovered damages, because under the English statute, failure to produce a ticket only rendered the passenger liable to pay his fare from the nearest station as provided by a by-law of the company duly passed under the authority of a statute. A passenger who purchases a ticket from another does not "pay his fare": **Reynolds v. Beasley** (1919) 1 K.B. 215.

Under the Act 52 & 53 Vic., cap. 57, sec. 5, already referred to, the English remedy is either to sue the passenger for the amount due, as was done in **London and North Western Ry. Co. v. Hinchcliffe** (1903), 2 K.B. 32; **G.W.R. v. Pocock**, 41 L.T.N.S. 415; **Great Northern Ry. Co. v. Palmer** (1895), 1 Q.B. 862; (provided the by-law creates a debt: **London & Brighton Ry. Co. v. Watson**, 4 C.P.D. 118), or to try and convict the delinquent passenger under a by-law of the company duly passed to cover such cases: **Hanks v. Bridgman** (1896), 1 Q.B. 253; **Lowe v. Volp**, *ibid.* 257. The judgment of Mr. Justice Gwynne in the **Beaver Case**, 22 S.C.R., at pp. 501 to 508, treats this subject exhaustively, and the decision was followed in **Taylor v. G.T.R.**, 2 Can. Ry. Cas. 99; but if

the conductor ejects a passenger who presents a ticket or offers to pay his fare, the railway company is liable for the conductor's acts: **Curtis v. G.T.R.**, 12 U.C.C.P. 89; **Dancey v. G.T.R.**, 20 O.R. 603, 19 A.R. 664. Where the ejectment was wrongful but the conductor acted *bona fide*, and the inconvenience resulting was trifling, a verdict of £50 was deemed to be excessive and a new trial was granted on this account: **Huntsman v. G.W.R.**, 20 U.C.R. 24; and where there were no circumstances of aggravation, though the ejectment was found to be unlawful, a new trial was granted unless the plaintiff would accept \$500 instead of \$1,000 awarded by the jury: **Dancey v. G.T.R.**, 19 A.R. 664. This case decides that the rule in some of the American Courts that a passenger must not resist a wrongful demand for his fare, but rather leave the train of his own accord and seek his remedy in the courts, is not in force in Ontario.

Conditions on Ticket. Subject to the statutory restrictions upon the freedom of contract, dealt with in notes to section 312, *supra*, the terms contained in a ticket are binding upon the passenger using it if he knew of them or had means of knowledge; and if he had such means of knowledge but did not avail himself of them to find out what he was agreeing to, he is nevertheless bound. On this ground, where the terms of a ticket were plainly printed across its face, and the passenger knew there was printing upon the ticket but did not read it, his failing to do so afforded no defence: **Coombs v. The Queen**, 4 Ex. C.R. 321, 26 S.C.R. 13; **Craig v. G.W.R.**, 24 U.C.R. 504; **Cunningham v. G.T.R.**, 9 L.C. Jur. 57, 11 L.C. Jur. 107, and see cases cited in **Taylor v. G.T.R.**, *supra*; but where the conditions are not printed so that they will be necessarily brought to the attention of the passenger if he reads his ticket, as when they are printed on the back and no reference is made to them on the front of the ticket, they will not bind the purchaser: **Henderson v. Stevenson**, L.R. 2, H.L. Sc. 470; though, where on the face of the ticket appears the words "see back," the passenger was bound by conditions on the back, provided at least that the company did that which was reasonably sufficient to give the plaintiff notice of the condition: **Parker v. South Eastern Ry. Co.**, L.R. 1 C.P.D., 618, 2 C.P.D. 416; **Harris v. G.W.R.**, 1 Q.B.D. 515; and where on the inside cover of a book of coupon tickets was printed a condition not referred to on the outside but apparent at once on turning the cover, it was held that the whole book was the contract, and the plaintiff could not accept it without accepting also the condition which was part of the book: **Burke v. South Eastern Ry. Co.**, 5 C.

P.D.. 1; see also **Watkins v. Rymill**, 10 Q.B.D. 178, where the plaintiff was held bound by conditions prominently exhibited in the form of a notice upon the premises where he accepted a receipt on which was printed "subject to the conditions as exhibited upon the premises." Where, owing to defective eyesight or other infirmity, or owing to lack of education, the passenger is not able to learn what is on his ticket, and the carrier takes no pains to inform him, the conditions may not be binding: **Bate v. C.P. R.**, 14 O.R. 625, 15 A.R. 388, 18 S.C.R. 697; **Richardson v. Rowntree** (1894), A.C. 217. In **G.T.R. v. Robinson** (1915) A.C. 740, Haldane, L.C. discusses the general question at p. 748, and 19 C.R.C. at p. 42, 22 D.L.R. at p. 6.

Many of the cases are discussed in the Supreme Court in **Provident Savings Society v. Mowat**, 32 S.C.R. 147, at pages 161 and 166, and at page 167 the following statement of law in **New York Life Assurance Company v. MacMaster**, 87 Fed. R. 63, was quoted and adopted: "If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents unless he was dissuaded from reading it by some trick, artifice or fraud of some other party to the agreement." In **Hood v. Anchor Line** (1918), A.C. 837, the House of Lords found that the Company did all that was reasonably necessary to bring the conditions of the ticket to the plaintiff's notice who was bound by its conditions although he did not read them. The authorities are there fully reviewed. A passenger holding a ticket has the right to a seat in a car and if the company cannot give him a seat on account of the number of passengers travelling, the traveller can refuse to be carried standing, get off the train and recover damages for non-fulfilment of his contract, but if he prefers to stay on the train and be carried standing, he must give up his ticket or pay his fare and in default may be put off the train. **Langlois v. Quebec & Lake St. John Ry. Co.**, 45 Que. S.C. 223. Railway companies are not bound to furnish smoking cars or any particular description of car beyond what the passenger's ticket calls for. **Brazeau v. C.P.R.** (1908) 8 C.R.C. 477, per Riddell, J. (Ont). The conditions upon a railway ticket were considered in **Taylor v. G.T.R.**, 2 Can. Ry. Cas. 99, which was a case where plaintiff purchased an excursion ticket from Indian Head, N.W.T., to Toronto and return, one of the conditions, which he signed, being that he should identify himself to the authorised agent of the railway in Toronto before he set out on his return journey, and obtain the agent's official signature, dated

and stamped at Toronto. On production of his ticket he secured his sleeping berth, had his baggage checked, and was admitted to the train and started on his return journey, but neglected to identify himself as required and was put off the train, after he had refused to pay his fare, although he offered to identify himself to the conductor, and it was held that he could not recover. In **Jones v. G. T.R.**, 9 O.L.R. 723, 4 C.R.C. 418, the defendants were held liable for the eviction of a lady holding a second-class ticket, because she would not go from a first-class car to a smoking car, which was the only second-class car on the train.

In **Dalahanty v. Michigan Central R.W. Co.**, 4 C.R.C. 451, 10 O.L.R. 388, the deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgeburg he drank heavily, and when near Bridgeburg began to annoy passengers, and the conductor compelled him to leave the train at that station, which was 700 feet from the end of the International Railway Bridge over the Niagara River, and the deceased, who was not given into charge of anybody, being intoxicated, strayed after the train, on which his luggage remained, and either fell or jumped from the bridge and was drowned. The evidence did not establish that the deceased was unable to take care of himself.

It was held that there was no duty on the part of the defendants either to carry him to his destination under restraint or to place him in charge of anyone at the station, and the action was dismissed.

In a somewhat similar case of **Dunn v. Dominion Atlantic Ry. Co.**, 52 D.L.R. 149, (1920) 60 S.C.R. 310, it was held that the right of the conductor to eject a passenger for disorderly conduct is not absolute but must be exercised with proper precaution to avoid putting the passenger in danger. In that case a drunken passenger was put off a train at a closed and unlighted station at one a.m.; some hours later his body was found on a track near the station; apparently he had been killed by a passing train; it was held that the evidence justified the jury in finding that deceased when ejected was not in a state to take care of himself and that putting him off under such circumstances was negligence on the part of the company which led to his death.

Collection of Tolls.

355. In case of refusal or neglect of payment on demand of any lawful tolls, or any part thereof, the same shall be recoverable in any court of competent jurisdiction. R.S., c .37, s. 344.

May be
enforced in
any court.

Former section 344.

The shipper is primarily liable for the tolls or freight charges, the law implying a contract on him who loads the goods for carriage that he will pay same. The carrier's right of recovery against the shipper exists even when the bill of lading contains a clause that the shipment is to be delivered to the consignee on payment by him of the charges, nor must the carrier to retain recourse against the shipper demand the charges from the consignee. **Domett v. Beckford** (1833) 5 B. & A. 521. **Great Western Ry. Co. v. Bagge** (1885) 15 Q.B.D. 625.

The liability of the shipper for payment of freight charges exists even if he is the agent of the consignee unless the fact of his being the agent of the consignee is known to the carrier. **Dickenson v. Lano** (1860) 2 F. & F. 188.

The Bills of Lading Act, R.S.C. Cap. 118, vests in the consignee named in a bill of lading and every endorsee of a bill of lading who obtains title to the goods mentioned therein by reason of the consignment or endorsement, all rights of action and subjects him to all liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself. This Act, however, does not affect any right to claim freight charges against the original shipper or owner or any liability of the consignee or endorsee by reason of such consignment or endorsement.

The common law principle prior to The Bills of Lading Act by which the consignee was liable for the freight charges is that where goods are shipped to be delivered to the consignee "he or they paying the freight" by delivering the goods to the consignee the carrier gives up his lien, and the acceptance of the goods under these conditions is evidence of an implied agreement by the consignee that he will pay freight. **Cock v. Taylor** (1811) 13 East 399.

Acceptance of the goods by surrender of the bill of lading was, however, at the most, evidence of an implied contract to pay the freight charges, but no such contract will be presumed. **Sanders v. Vanzeller** (1843) 4 Q.B. 260.

As stated in an American case the principle is that he who accepts a thing which he knows to be subject to a duty or charge, which he is expected to pay, thereby contracts by implication to take the duty or charge on him-

self. Morton, C.J., in **Old Colony Ry. v. Wilder** (1884), 137 Mass. 536.

The doctrine of the Courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof. Per Field, C.J. in **Union Freight v. Winkley** (1893) 159 Mass. P. 133.

Where the consignee is merely the agent of the consignor and owing to the carrier's error is led to believe that the freight charges had been paid and takes delivery, the carrier cannot recover the freight charges from him. **C.P.R. v. Watts** (1914) 19 C.R.C. 338, 20 D.L.R. 607.

The liability of consignee and endorsee imposed by The Bills of Lading Act depends, however, on ownership of the goods, and if the consignee endorses the bill of lading and receives the goods without the property passing to him he is merely the agent of the owner and not necessarily liable for the freight charges.

The fact of the consignee being agent of the shipper must be known to the carrier before giving up his lien for the consignee to escape liability for the freight charges. After the carrier has given up his lien the consignee cannot change his status from owner to agent. **Sheets v. Wilgus** (1869) 56 Barb. 662.

If the consignee assigns the bill of lading before the goods are delivered to him he is not liable for the freight charges unless the endorsee received them as his agent. **Tobin v. Crawford** (1839) 9 M. & W. 716.

Seizure and
sale of goods
subject to
tolls.

356. (1) The company may, instead of proceeding as aforesaid for the recovery of such tolls, seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof, and in the meantime the said goods shall be at the risk of the owners thereof.

Sale of
goods.

(2) If the tolls are not paid within six weeks, and, where the goods are perishable goods, if the tolls are not paid upon demand, or such goods are liable to perish while in the possession of the company by reason of delay in payment or taking delivery by the consignee, the company may advertise and sell the whole or any part of such goods, and, out of the money arising from such sale,

Application
of proceeds.

retain the tolls payable and all reasonable charges and expenses of such seizure, detention and sale.

(3) The company shall pay or deliver the surplus, if Surplus.
any, or such of the goods as remain unsold, to the person entitled thereto and may recover the deficiency, if any, by action in any court of competent jurisdiction. R.S., c. 37, s. 345. Am.

Former section 345 amended in sub-section 3 by adding the concluding words after "thereto" in third line, thus making it clear that the company is not precluded, in case of deficiency after sale, from bringing action to recover the balance of the tolls and expenses of sale.

This section corresponds with slight changes to sections 236 and 237 in Act of 1888 and concluding portion of section 17 in Act of 1879, and corresponds to 8 Vict., ch. 20, sec. 97 (Eng.).

As to a demand of the tolls being necessary before any sale can take place see **Worden v. C.P.R.**, 13 O.R. 652. A postcard addressed to the consignee is not a sufficient demand unless it is shown to have reached him. **Ibid.**

This section was held by Britton, J., in **Clisdell v. Kingston & Pembroke Ry. Co.**, 9 C.R.C. 73, 18 O.L.R. 169, to do nothing more than confirm and establish the carrier's lien; there is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee. In **Swale v. C.P.R.**, 16 C.R.C. 363, 15 D. L.R. 816, 29 O.L.R. 634, decided under former section 345, the railway company was held liable for the default of the auctioneer, to whom the goods were handed over to sell, to account for the surplus of goods not required for that purpose. The section does not require the employment of a licensed auctioneer. **Ibid.**

In **Duthie v. G.T.R.**, 4 C.R.C. 304, it was held that any claims for damages for premature or improvident sales should be prosecuted by action in the Provincial Courts. The Board has jurisdiction to enforce the provision as to the disposal of the surplus which necessarily involves the authority (possessed under the other provisions of the Act) to determine the legality of the Company's claim to tolls, **ibid.**, p. 320.

The goods need not be sold by public auction as is re-

quired in the case of sale of unclaimed goods provided for in section 357.

Unclaimed
goods.

357. (1) If any goods remain in the possession of the company unclaimed for the space of twelve months, the company may thereafter, and on giving public notice thereof by advertisement for six weeks in the official gazette of the province in which such goods are, and in such other newspapers as it deems necessary, sell such goods by public auction, at a time and place which shall be mentioned in such advertisement, and, out of the proceeds thereof, pay such tolls and all reasonable charges for storing, advertising and selling such goods.

Sale.

Proceeds.

Balance.

(2) The balance of the proceeds, if any, shall be kept by the company for a further period of three months, to be paid over to any person entitled thereto.

If unclaimed.

(3) In default of such balance being claimed before the expiration of the period last aforesaid, the same shall be deposited with the Minister of Finance for the public uses of Canada.

Limitation
of time for
claim.

(4) Such balance may be claimed by the person entitled thereto at any time within six years from the date of such deposit. R.S., c. 37, ss. 346, 347.

Former sections 346 and 347. See **Worden v. C.P.R.**, *supra*, section 356.

Traffic by Water.

When Act
applies to.

358. The provisions of this Act shall, in respect of tolls, tariffs and joint tariffs, so far as deemed applicable by the Board, extend and apply to the traffic carried by any railway company by sea or by inland water, between any ports or places in Canada, if the company owns, chartered, uses, maintains or works, or is a party to any arrangement for using, maintaining or working vessels for carrying traffic by sea or by inland water between any such ports or places. R.S., c. 37, s. 7 (1). Am.

Former section 7 (1), the words in line 2 "so far as deemed applicable by the Board" have been substituted for "so far as they are applicable." In **Dawson Board of Trade v. White Pass & Yukon Ry. Co.**, 9 C.R.C. 190, 11 *ibid.* 402, and 13 *ibid.* 527, the Board dealt with a case

of land and water route, see also **Algoma Central & Hudson Bay Ry. Co. v. G.T.R.**, 5 C.R.C. 196, 8 *ibid.* 46.

Tolls and Traffic on Bridges and Tunnels.

359. The provisions of this Act in respect of tolls, tariffs and traffic shall, in so far as the Board deems applicable, extend and apply to,—

Provisions
apply to—

- (a) any company which has power under any Special Act to construct, maintain and operate any bridge or tunnel for railway purposes, or for railway and traffic purposes, and to charge tolls for traffic carried over, upon or through such structure by any railway; and,
- (b) the traffic so carried over, upon or through such structure. R.S., c. 37, s. 7 (2). Am.

Bridge or
tunnel
company.

Traffic
thereby.

Former section 7 (2) with a similar amendment to section 7 (1), with the addition of “tariffs and traffic” after “tolls” in line 1.

Express Business—Express Tolls and Tariffs.

360. (1) All express tolls shall be subject to the approval of the Board.

Approval
of tolls.

(2) The Board may disallow any express tariff or any portion thereof which it considers unjust or unreasonable, and shall have and may exercise all such powers with respect to express tolls and such tariffs as it has or may exercise under this Act with respect to freight tolls and freight tariffs; and all the provisions of this Act applicable to freight tolls and freight tariffs, in so far as such provisions are applicable and not inconsistent with the provisions of this section and the five next following sections, shall apply to express tolls and tariffs. R.S., c. 37, s. 348.

Powers of
Board.

Application
of Act.

361. Tariffs of such express tolls shall be filed with the Board and shall be in such form, size and style and give such information, particulars and details as the Board, from time to time, by regulation or by order in any particular case, prescribes. R.S., c. 37, s. 349.

Tariff of
tolls.

The jurisdiction of the Board over express companies is confined to the question of tolls and tariffs with accompanying provisions for making same effective: **Graham & Strang v. Dominion Express Co.** (Masten, J.) 55 D.L.R. 39, 48 O.L.R. 83. See also **Canadian Mfrs. v.**

Canadian Express Traffic Assn, 26 C.R.C. 35. For a general explanation of express service and the underlying principles of the tariffs and classifications applicable thereto, see Chap. XVII Inland Traffic by Dr. S. J. McLean, Assistant Chief Commissioner of the Railway Board. The express classification is different from the freight classification. It may be said to be a classification of exceptions. **New Albany Box & Basket Co. v. American Ry. Express Co., et al.**, 56 I.C.C. 720.

The penalty for carrying by express without filing tariff, etc., is by section 436 a sum not exceeding \$100 for each offence. The jurisdiction of the Board does not extend to ordering express companies to provide facilities for traffic under sec. 316. Such directions must be obtained as against the railway company directly concerned in the express service.

The Board cannot order an express company to operate over the line of a railway from which it has withdrawn where such line is acquired by a railway company which operates another express service. **Shippers by Express v. Canadian Northern Express Co.**, 14 C.R.C. 183.

The Board has no jurisdiction to order express companies to carry traffic in competition with the post office department: **Express Traffic Association v. Canadian Manufacturers' Association, et al.**, 13 C.R.C. 169; **British Columbia News Co. v. Express Traffic Association**, *ibid.* 176.

The Board will not compel the continuance of express car service where it is proved unremunerative. **Jordan Co-operative Co. v. Canadian Express Co.**, 23 C.R.C. 55.

An express company was ordered to establish a commodity toll for the carriage of milk for delivery to a connecting express company in the United States. **Farmers Dairy & Produce Co. v. Dominion Express Co.**, 17 C.R.C. 106.

A higher toll will not be allowed upon cream for domestic purposes than for butter making: **Riley v. Dominion Express Co.**, 17 C.R.C. 112, followed in **Western Retail Lumbermen's Association v. C.P.R., et al.**, 20 C.R.C. 155.

An express company may reduce its tolls to meet the competition of another express company but it must answer any allegation of unjust discrimination as to traffic received under substantially similar circumstances at points to which the reduced tolls do not apply. **Aylmer Condensed Milk Co. v. American Express Co.**, 17 C.R.C. 100.

Municipal boundaries may usually be taken as suitable limits for free delivery except in large cities where municipal boundaries are enlarged from time to time—in the City of Toronto a central zone for free service was established with toll zones outside. See **Toronto et al. v. Express Traffic Association**, 22 C.R.C. 375. Toll or pay zones outside free delivery limits were abolished by the Board, 25 C.R.C. 61, and provision was therein made for the extension of free delivery service.

In **Express Traffic Association v. Cities of Montreal, Toronto, et al.**, 25 C.R.C. 61, the Board found as a reasonable express basis:—one and a half times the standard freight toll with sixty cents per 100 pounds added—express business is a railway function and the reasonableness of express tolls is to be determined on the same basis as if the express service were rendered by the railway, *ibid.*

The Express Classification for Canada, approved by the Board is No. 4, effective 1st September, 1919, by the judgment in the last case under General Order No. 268, dated July 25, 1919.

362. No company shall carry or transport any goods by express, unless and until the tariff of express tolls therefor or in connection therewith has been submitted to and filed with the Board in the manner hereinbefore provided; or, in the case of competitive tariffs, unless such tariffs are filed in accordance with the rules and regulations of the Board made in relation thereto; or in any case where such express toll in any tariff has been disallowed or **suspended** by the Board. R.S., c. 37, s. 350. Am.

Goods not to be carried until tariff is filed, or after disallowance.

Express Toll is Defined by sec. 2 (9)—Railway handling express matter ordered to file express tariffs under old sec. 350, now sec. 362. **Cardston v. Alberta R. & I. Co.**, 9 C.R.C. 214 at pp. 220.

363. No express toll shall be charged in respect of which there is default in such filing, or which is disallowed or **suspended** by the Board. R.S., c. 37, s. 351. Am.

Tolls not to be charged until filed and approved.

Former sections 350 and 351 amended by adding the words "or suspended" in the last line after "disallowed." The proviso in former sec. 351 allowing a company which

was previous to July 13, 1906, charging express tolls without filing or approval to continue doing so for six months thereafter or such further period allowed by the Board is omitted.

Board may Define Carriage by Express.

Board may
define
carriage by
express.

364. The Board may by regulation, or in any particular case, prescribe what is carriage or transportation of goods by express, or whether goods are carried or transported by express within the meaning of this Act, and may order that all such goods as the Board may think proper shall be carried by express. R.S., c. 37, s. 352. Am.

Former section 352, the concluding words "and may order that all such goods as the Board may think proper shall be carried by express" have been added, no doubt in consequence of the decision in **Canadian and Dominion Express Cos. v. Commercial Acetylene Co.** (1909) 9 C. R.C. 172, where it was held before this amendment that express companies could exercise their own discretion in refusing to carry any particular commodity. In **Graham & Strang v. Dominion Express Co.**, 55 D.L.R. 39, 48 O.L.R. 83, Masten, J., referring to this section observes that there is no corresponding provision under which the Board may interdict the express company from carrying any particular class of goods since the defendants were held to be fundamentally common carriers, with their obligations modified as to tariff rates by the Railway Act, following **Johnson v. Dominion Express Co.** (1896), 28 O.R. 203 at p. 205, and **James v. Dominion Express Co.** (1907) 13 O.L.R. 211 at p. 218.

Contracts Limiting Liability of Express Companies.

Conditions
limiting
liability to
be approved
by Board.

365. (1) No contract, condition, by-law, regulation, declaration or notice made or given by any company or any person or corporation charging express tolls impairing, restricting or limiting the liability of such company, person or corporation with respect to the collecting, receiving, caring for or handling of any goods for the purpose of sending, carrying or transporting them by express, or for or in connection with the sending, carrying, transporting or delivery by express of any goods, shall have any force or effect unless first approved by order or regulation of the Board.

(2) The Board may in any case or by regulation,—

Regulation
of carriage
by express.

- (a) determine the extent to which the liability of such company, person or corporation may be so impaired, restricted or limited; and,
- (b) prescribe the terms and conditions under which goods may be collected, received, cared for or handled for the purpose of sending, carrying or transporting them by express, or under which goods may be sent, carried, transported or delivered by express by any such company, person or corporation. R.S., c. 37, s. 353. Am.

Former section 353, omitting a provision (sub-sec. 2) saving existing contracts in use prior to July 13, 1906, until dealt with by the Board. The form of express receipt now in use was authorised by the Board's General Order No. 144, dated April 29th, 1915. By the conditions of this receipt the Company's liability is limited to \$50 on any shipment unless a higher value is declared by the shipper and inserted in the receipt, when an extra charge is made depending upon the value declared. The express company is not liable for loss, damage or delay caused by conditions beyond its control, unless such loss or damage is caused by the negligence of the railway company upon whose trains or property the shipment was at the time such loss or damage occurred. See **Allen v. C.P.R.**, 10 C.R.C. 408, 19 O.L.R. 510, affirmed 10 C.R.C. 424, 21 O.L.R. 416 decided under the conditions of receipt previously in use. As to notice of claim see **Brunswick etc., Co. v. Dom. Express Co.**, 61 D.L.R. 654. Forms of C.O.D. receipt and Live Stock contract containing special conditions limiting liability have also been authorised by the Board. Although an express company is thus enabled to use a special form of contract limiting its liability it may contract upon the basis of a more extended liability as upon its contractual rights at common law. **Wilkinson v. Canadian Express Co.**, 14 C.R.C. 267, 7 D. L.R. 450.

Returns by Companies Charging Express Tolls.

366. (1) Every company and every person and corporation charging express tolls shall make to the Board an annual return of its capital, business and working expenditure, and such other information and particulars, including a statement of unclaimed goods, as the Board directs.

Annual
return by
company.

Form, etc.,
of return.

(2) Such return shall be made in such form, covering such period, and at such time, and shall be published in such manner, as the Board from time to time directs. R.S., c. 37, s. 354.

Former section 354. By section 437 a penalty not exceeding ten dollars is imposed for every day during which default is made in furnishing such returns.

Telegraphs, Telephones, Power and Electricity.

Telegraphs and Telephones on Railways for Railway Purposes.

Telegraph
and
telephone
lines.

367. (1) The railway company may, **as incidental to and as part of its undertaking**, construct and operate telegraph and telephone lines upon its railway for the purposes of its undertaking.

Arrange-
ments with
other com-
panies.

(2) The railway company may, for the purpose of operating such lines or exchanging and transmitting messages, enter into contracts with any companies having telegraph or telephone powers, and may connect its own lines with the lines of any such companies, or may lease its own lines to any such companies.

R.S., c. 126,
Part II to
apply.

(3) Part II of the **Telegraphs Act** shall apply to the telegraphic business of the railway company. R.S., c. 37, s. 244. Am.

Former section 244—in (1) after “may” the words “as incidental to and as part of its undertaking” have been added.

This section does not appear to authorise railways to build telegraph or telephone lines for commercial purposes, but only for the purposes of the undertaking, that is for the railway, the wording in this respect being similar to the wording in the first line of section 162, **ante**, so that unless power is given to a railway company by its Special Act to do a commercial business, see sec. 373 (former sec. 247), this section would not presumably enable it to do so, but the section expressly enables it to lease its lines to companies having powers to do a general business. And see secs. 162 (o), **ante**, as to railway companies hereafter incorporated being given this power, see section 369.

Telegraphs Act, R.S.C., cap. 126, Part II, provides for the construction of the line, that no bridge shall be built by a telegraph company over navigable rivers, that messages shall be transmitted in the order of receipt except certain preferential messages there designated and that

in certain events the Government may temporarily take over the line. In the case of railway telegraph lines, see also the provisions of sections 377 and 378, *infra*. Except in the case of railway companies authorised to do a commercial business, there does not appear to be much to which R.S.C., cap. 126, would frequently apply. In this connection reference should also be made to R.S.C., cap. 126 Pt. I., being "An Act Respecting Secrecy by Officers and Persons Employed on Telegraph Lines" which provides for the punishment of telegraph employees who divulge information except when lawfully authorised or directed to give it. This statute does not provide an absolute privilege for telegrams which must notwithstanding its provisions be produced by the company when it has been duly subpoenaed: **Dwight v. Macklam**, 15 O.R. 148; followed in **Hannum v. McRae**, 18 P.R. 185, but it is submitted that a telegraph company should not be subpoenaed to produce its copy until the usual methods of securing the copies in the hands of the sender or receiver have been exhausted. In an unreported case in Ontario of **Batten v. Gordon** in 1899: Boyd, C., in Chambers, adjourned a motion to compel a telegraph company to produce telegrams until an effort had been made to obtain copies from the persons who received them, and production having been obtained in this way the matter dropped. Other statutes affecting telegraph companies are R.S.O., caps. 180 and 185 and R.S.C., cap. 126.

Lease of Right to Operate. In **C.P.R. Co. v. Western Union Telegraph Co.**, 17 S.C.R. 151, at p. 158, Ritchie, C.J., said that a railway company "had as incident to and necessary for the safe operation of the road, the right and power to erect a line of telegraph and had the exclusive right to do so along their line of railway and having themselves such exclusive right, I can see no reason why they should not confer such exclusive right and the other privileges mentioned in the contract whereby they were enabled to secure ample telegraphic services for the operation of the road instead of erecting and equipping a line of telegraph for themselves." It was further held that a railway company which had made such a contract had power to bind by it any company to which the railway was subsequently assigned: **Great Northwestern Telegraph Co. v. Montreal Telegraph Co.**, 20 S.C.R. 170.

Special Powers of Railway Companies.

368. Whenever in any Special Act hereafter passed it is stated or provided that a railway company shall have

Electric and
other power.

power to acquire, transmit and distribute electric and other power or energy, such company, subject to the provisions of sections three hundred and seventy and three hundred and seventy-three of this Act, may for the purposes of its undertaking acquire, but not by expropriation, electric and other power or energy, and transmit and deliver the same to any place in the municipalities through which the railway is built, and receive, transform, transmit, distribute and supply such power or energy in any form; and may dispose of the surplus thereof, and collect rates and charges therefor, but no such rate or charge shall be demanded or taken until it has been approved of by the Board, and the Board may revise such rates and charges whenever it deems proper. **New.**

Telegraphs
and tele-
phones.

369. (1) Whenever in any Special Act hereafter passed it is stated or provided that a railway company shall have power to transmit telegraph and telephone messages for the public and collect tolls therefor, such company may, subject to the provisions of this Act, construct and operate telegraph and telephone lines upon its railway, and establish offices for and undertake the transmission of messages for the public, and collect tolls therefor; and for the purpose of operating such lines or exchanging or transmitting messages, may, subject to the provisions of this Act, enter into contracts with any companies having telegraph or telephone powers and may connect its own lines with the lines of, or may lease its own lines to, any such companies.

Tolls subject
to Act.

(2) No toll or charge shall be demanded or taken for the transmission of any message or for leasing or using the telegraphs or telephones of such company except in accordance with section three hundred and seventy-six of this Act, and the said company and its said business and works shall in all respects be subject to the provisions of the said section.

R.S., c. 126,
Part II to
apply.

(3) Part II of the **Telegraphs Act**, except such portions thereof as are inconsistent with this Act, shall apply to the telegraphic business of such company. **New.**

See notes to sec. 367.

370. No power conferred as in the last two preceding sections mentioned and nothing in the said sections or in the **Telegraphs Act**, shall authorise such company to construct or operate any line along any highway or public place, without first obtaining the consent, expressed by by-law, of the municipality having jurisdiction over such highway or public place, nor without complying with any terms stated or provided for in such by-law, or authorise such company to sell, dispose of or distribute power or energy within or for use within the limits of any municipality, without the consent, expressed by by-law, of such municipality. **New.**

Control of
municipality.

R.S., c. 126.

Telephone Connection With Railway Stations.

371. (1) Whenever any **province**, municipality, corporation or incorporated company has authority to construct, operate and maintain a telephonic system in any district, and is desirous of obtaining telephonic connection or communication with or within any station or premises of a railway company in such district, and cannot agree with **such** company with respect thereto, such **province**, municipality, corporation or incorporated company may apply to the Board for leave therefor.

Municipal
and other
systems, con-
nection with
stations, etc.

(2) The Board may also upon the application of any interested party authorise any telephone company operated by any province, municipality or incorporated company to install at its own expense telephone connection with any station of the company, the annual charge, if any, to be paid by the company for such service and all other terms or conditions connected therewith to be such as the Board may determine, having regard to all local conditions, but in no case is such charge to exceed the customary local rate.

Board may
order upon
terms.

(3) Notwithstanding anything in any Act contained, the Board, in determining the terms or compensation upon which any such connection or communication is to be provided for, shall not take into consideration any contract, lease or agreement now or hereafter in force by which the railway company has given or gives any exclusive or other privilege to any company or person,

Contracts
giving
exclusive
privileges
not to be
taken into
considera-
tion.

other than the applicant, with respect to any such station or premises. R.S., c. 37, s. 245. Am.

This section first appeared in the Railway Act of 1903, chap. 58, as sec. 193. It was amended by 6 Edw. VII., cap. 42, sec. 17 by adding sub-sec. 3. In the present Act sub-sec. 2 has been entirely changed. In sub-sec. 3 "railway" has been inserted before "company" in line 6.

In some instances agreements have been made between railways and certain telephone companies that the latter shall have the exclusive right to install telephones in the former's stations, and under this agreement competing telephone companies had been refused leave to place their instruments upon railway property. The purpose of this clause is to enable all telephone lines to have their instruments in the stations, notwithstanding the refusal of the railway companies, provided they can first obtain the approval of the Board.

In an application under the Act of 1903, **Port Arthur v. Bell Telephone Co.**, 3 C.R.C. 205, and 4 C.R.C. 279, the Board expressed the opinion that the respondent was entitled to compensation for the loss of its exclusive contract with the railway company in whose stations only its instruments were placed for use. After the amendment of 1906 another application was made to the Board, **Peoples and Caledon Telephone Co. v. C.P.R. and G.T.R.**, 9 C.R.C. 161, for an order compelling the railway companies to permit the installation and maintenance in railway stations of telephones. It was held that under this section the Board has jurisdiction to grant the order applied for, and may impose such terms as it deems best and expedient, but should not take into consideration any contract giving exclusive privileges to any other telephone company; that the only point to be considered by the Board is whether such telephone connections will be of benefit and convenience to the public having business with the railway company; that telephone companies who may be entitled to such an order being usually incorporated by the province and thus not subject to the jurisdiction of the Board should enter into a contract containing fair and reasonable conditions to be prescribed by the Board. The form of contract containing the prescribed conditions is appended to the report in the last case.

The Board's jurisdiction over telephone and telegraph tolls and companies was further extended in 1908 by chap. 61, sec. 4, now sec. 375 **q.v.**

Sub-sec. 2 is new, giving the Board power to authorise any telephone company to install at its own expense telephone connection with any railway station upon terms to be fixed by the Board.

Under former sec. 245 the Board had no power to compel a railway company to continue the maintenance of such telephone connection, this not being a facility which railway companies were required to furnish under the "facilities" clause, former sec. 284, now sec. 312. **Province of Manitoba v. C.P.R.**, 21 C.R.C. 445. Telephonic communication with a railway station to be acquainted with the movement of freight or passenger trains is not a facility which railway companies are required to furnish the public under sec. 312, former sec. 284. See also **Alberta United Farmers v. C.P.R.**, 23 C.R.C. 104. By sec. 375 (2), sec. 312, *inter alia*, does not apply to telegraph and telephone companies defined in that section as well as all such systems, lines and business of such companies within the legislative authority of the Parliament of Canada.

Putting Wires Across Railways or Other Wires.

372. (1) Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in sub-section (5) of this section, be constructed or maintained,—

Leave of
Board.

- (a) along or across a railway, by any company other than the railway company owning or controlling the railway; or
- (b) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

(2) Upon any application for such leave, the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

Plans to be
submitted.

(3) The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

Powers of
Board.

Authority
for works.

(4) Upon such order being made the proposed works may be constructed and maintained subject to and in accordance with such order.

When leave
not required.

(5) Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under section three hundred and sixty-seven of this Act, nor for the maintenance of works now authorised, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes. R.S., c. 37, s. 246; 1911, c. 22, s. 7; 1917, c. 37, s. 4. Am.

Former section 246 and subsequently amended as stated.

Under the maxim **cujus est solum ejus est usque ad coelum** no person would have the right to place wires across another's property, unless such right were expressly or impliedly given by statute. The present section enables a company having power to cross a railway with its wires to do so subject to the supervision of the Board. No express provision is made for paying compensation for the right, although under exceptional circumstances the Board might make the payment of compensation a "term or condition" upon which alone the right to cross should be granted; no such case yet appears to have arisen.

See **Canadian Pacific & Canadian Northern Ry. Cos. v. Kaministiquia Power Co.**, 6 C.R.C. 160.

The respondents, a company incorporated under provincial charter, attempted to cross a telephone company with their high-tension wire; held, that the telephone company came within the meaning of the word "railway" under this section, and that leave of the Board must first be obtained before such crossing could be made. **Bell Telephone Co. v. Nipissing Power Co.**, 9 C.R.C. 473.

The words "across or near other such lines, wires, etc," are inserted in sub-sec. 1 (b) making clear what was already held to be the law in the last case, namely, that the provisions of the Act must be complied with in putting wires across other wires within the legislative authority of the Parliament of Canada.

It is left to the Board to say under sec. 5 of 7 & 8

Edw. VII., cap. 61 (now sec. 375, sub-sec. 12) what provisions of the Railway Act apply to telephone companies. The Board has power therefore under sec. 372 to require a provincial power company to observe its standard regulations in crossing a Dominion telephone line. **Bell Telephone Co. v. Nipissing Power Co.**, 9 C.R.C. 473.

Where a railway company which is senior to a telephone line owns land at a point at which a telephone line crosses it and makes changes in its system, the telephone company must pay the cost of any resulting changes in its own lines; otherwise, when the telephone line is on a highway crossed by the railway company's tracks. **London Ry. Commission v. Bell Telephone Co.**, 18 C.R.C. 435.

Putting Lines or Wires Across or Along Highways, Etc.

373. (1) Subject to the provisions of the other sub-sections of this section, any company empowered by Special Act or other authority of the Parliament of Canada to construct, operate and maintain telegraph or telephone lines, may, for the purpose of exercising the said powers, enter upon, and, as often as the company thinks proper, break up and open any highway, square or other public place, provided always that,—

Lines and
wires on
highways
and public
places.

This section replaces former sections 247 and 248, except sec. 247 in the cases provided for in section 461. See **Toronto & Niagara Power Co. v. North Toronto**, 14 C.R.C. 392, 5 D.L.R. 43, (1912) A.C. 834.

Rights on Highways. The present section requires that municipalities shall consent to the breaking up and opening of highways by these companies. Where a telephone company had with the leave of a town placed their poles upon a highway and an electric light company which had also subsequently obtained similar leave proceeded to erect poles and wires in dangerous proximity to those of the telephone company, it was held that the latter having been lawfully in prior possession the light company should be restrained from placing their poles in such a position as would cause danger: **Bell Telephone Co. v. Belleville Electric Light Co.**, 12 O.R. 571; **Jacques Cartier, etc., Co. v. Quebec, etc., Co.**, Q.R. 11, K.B. 511. But a municipality is not authorised in Ontario to grant an exclusive right to use its streets and thereby create a monopoly; **Re Robinson and St. Thomas**, 23 O.R. 489; **Town of Cobalt v. Temiskaming Telephone Co.**, 59 S.C.R. 62; and the same rule prevails in Manitoba; **Winnipeg, etc., Co. v. Winnipeg, etc., Ry. Co.**, 9 Man. L.R. 219; but

a different rule was laid down in Quebec: **Bell v. Westmount**, Q.R. 9 Q.B. 34, though the case turned somewhat upon the terms of the particular contract in question which granted exclusive privileges for ten years. The subject was much discussed in **Ottawa, etc., Ry. Co. v. Hull Electric Co.**, Q.R. 16 S.C. 1, Q.R. 10, K.B. 34, (1902) A.C. 237, though the decision finally turned on the terms of special legislation validating an exclusive franchise. The fact that a telephone company has planted its poles on a highway with the consent and under the supervision of a municipality does not relieve it from liability if it appears that there has been negligence in placing them which has resulted in injury to the plaintiff: **Bonn v. Bell Telephone Co.**, 30 O.R. 696; **Joyce v. Halifax Street Ry. Co.**, 24 N.S.R. 113; and **Atkinson v. Chatham**, 29 O.R. 518; 26 A.R. 521, reversed 31 S.C.R. 61, where it was finally held that the company was not liable for injuries sustained by a carriage coming in contact with a telephone pole lawfully placed in the highway. Speaking generally, it may be said that a telephone or other company has no right to use the streets without legislative sanction either directly or indirectly through the action of properly authorised municipal bodies: **Regina v. United, etc., Co.**, 31 L.J.M.C. 166, 9 Cox C.C. 174, and the right of the public is to have the whole width of the road preserved free from obstruction, and it is not confined to that part which is used, or the *via trita*: **Turner v. Ringwood**, L.R. 9 Eq. 418, 422. But the effect of Canadian legislation is to legalize the obstruction created by the poles so far that they cannot be abated or complained of as a public nuisance: **Sherbrooke, etc., Assn. v. Sherbrooke**, Mont. L.R. 6 Q.B. 100; this still leaves open the question whether the company may not be mulcted in damages for particular injury to a traveller if the obstruction is found to be dangerous: See **People v. Metropolitan, etc., Co.**, 31 Hun. 596; and **Bonn v. Bell Telephone Co.**, 30 O.R. 696. In England where the fee in a street is generally vested in individuals and the possession and control are vested in municipalities or urban authorities only for the purpose of regulating the ordinary user of the highway as such, it has been held that they have no power to prevent the passage of wires overhead which are so high that the ordinary user of the street is not interfered with: **Finchley, etc., Co. v. Finchley** (1902), 1 Ch. 873, reversed (1903), 1 Ch. 437, and compare **Montreal, etc., Ry. Co. v. Ottawa**, 2 O.L.R. 336, 4 O.L.R. 56, 33 S.C.R. 376. In Quebec it was said in **Bell Telephone Co. v. Montreal Street Ry. Co.** (1897),

33 Can. L.J. 697, Q.R. 10 S.C. 162, 6 Q.B. 223, that the dominant purpose of a street being for public passage any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use unless a contrary intent be clearly expressed; and therefore a telephone company having no vested interest in or exclusive right in the ground circuit or earth system as against a railway company duly incorporated can not recover by way of damages the cost of converting from such a system to some other system which would not be interfered with by the use of electric power by the railway company. Where an electric company was empowered under certain conditions which it fulfilled, to lay underground wires, it was held that there was an implied power to break up city streets for the purpose of doing so and the city was refused an injunction restraining them from doing so: **Montreal v. Standard, etc., Co.**, Q.R. 5 Q.B. 558 (1897), A.C. 527.

Jurisdiction of Dominion Parliament. By section 91, sub-section 10, of the B.N.A. Act all works within a Province are subject to the jurisdiction of the Provincial Legislature unless they are works connecting more than one province or are declared to be works for the general advantage of Canada or of two or more provinces and the Dominion has no power to incorporate a telephone company to do business in any single province unless it declares it to be a work for the general advantage of Canada or of two or more provinces: **Regina v. Mohr**, 7 Q. L.R. 183, 2 Cart. 257; but where a work comes within that description it is subject only to such supervision as the Parliament of Canada imposes and is not subject to municipal control unless, as is the case in the present section, such control is expressly provided for: **Toronto v. Bell Telephone Co.**, 3 O.L.R. 465, 6 O.L.R. 335, (1905) A.C. 52.

- (a) such company shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building;

Conditions.
Travel and
access.

As to "the public right of travel:" see **Bonn v. Bell Telephone Co.**, 30 O.R. 696; **Atkinson v. Chatham**, 29 O.R. 518, 26 A.R. 521, 31 S.C.R. 61.

- (b) in cities, towns and incorporated or police villages such company shall not permit any wire to be less than twenty-two feet, or less than any

Height of
wires.

greater height which the Board may direct, above such highway or public place; nor shall it in any municipality permit any wire which crosses any highway or public place to be less than eighteen feet, or less than any greater height the Board may direct, above such highway or public place; nor shall it permit any wire which crosses or is adjacent to any private way, entrance or lane used for vehicular traffic to be less than seventeen feet or less than any greater height the Board may direct above such private way, entrance or lane; or erect more than one line of poles along any highway.

There are provisions in various Municipal Acts such as R.S.O. (1914) c. 192, s. 399 (17) and (50), for regulating the erection and maintenance of electric light, telegraph and telephone poles and wires, but under such decisions as **Canadian Pacific Ry. Co. v. Notre Dame de Bonsecours** (1899), A.C. 367 and **Toronto v. Bell Telephone Co.**, 3 O.L.R. 465, 6 O.L.R. 335, (1905) A.C. 52, these provincial statutes would not govern a work which is declared to be for the general advantage of Canada.

Poles.

- (c) all poles shall be as nearly as possible straight and perpendicular, and shall, in cities and towns, be painted;

As to general effect of municipal regulations see notes to sub-sec. (b) *ante*, and as to damages see **Bonn v. Bell Telephone Co.**, *supra*, and **Bell Telephone Co. v. Chatham**, 31 S.C.R. 61; where the Act of incorporation requires supervision by the municipality in planting poles this does not relieve the telephone company from liability for damages when the poles are planted in such a way as to become an element of danger to the public.

Trees.

- (d) such company shall not unnecessarily nor without giving at least ten days' previous notice to the owner thereof or to the municipality, nor in any case where forbidden by the Board, cut down or mutilate any shade, fruit or ornamental trees, but the Board may when it deems proper, dispense with such notice and may in any case make any order or direction it deems fit respecting such trees;

The effect of this sub-section as in sub-section (c), **ante**, is to eliminate the feature of municipal control. The right to cut trees now rests in the company unless forbidden by the Board, subject to its giving ten days' previous notice to the owner or the municipality and being able to show the necessity for what they do. Under a somewhat similar enactment it was held in New Brunswick that it is not sufficient for a company merely to allege that it was necessary to cut trees, it must be prepared to prove it, and failing such proof the company was liable to an action for damages and the owner was not restricted to his claim for compensation under the statute: **Gilchrist v. Dominion Telegraph Co.**, 19 N.B.R. 553, 1 Cassels Sup. Ct. Dig. p. 844, 20 N.B.R. 241. No provision is made for compensation for any of the works authorised by this section, and it would appear that an owner's only remedy is an action for damages where he can show negligence in the execution of the works. Section 164, **ante**, requires a company to make full compensation in the manner in this or the Special Act provided for all damages sustained by reason of the exercise of the powers conferred, but no method is prescribed by which compensation can be obtained for loss by the execution of the works now authorised.

Cutting Trees on Highways. In England the presumption is that the owner of land adjoining a highway owns the fee in the soil of the highway **ad medium filum viae**; **Salisbury v. Great Northern Ry. Co.**, 5 C.B.N.S., 174; **Mappin v. Liberty Co.**, 19 T.L.R. 51, and in some cases the same rule prevails in Canada and therefore the property in trees planted in the highway is vested in the adjoining owner who may sue for any wrongful damage to them: **O'Connor v. Nova Scotia Telephone Co.**, 23 N.S.R. 509, 22 S.C.R. 276.

In Ontario, unless otherwise expressly provided, the soil and freehold of every highway is vested in the municipality having for the time being jurisdiction over the highway, R.S.O., cap. 192, sec. 433. The trees thereon belong to the adjacent owner under the Tree Planting Act, R.S.O., cap. 213, and the adjacent owner has a private right of action for damage unlawfully done to the trees whether of natural growth or planted. **Douglas v. Fox**, 31 U.C.C.P. 140. Where branches of trees planted on a private owner's land extend over the highway, the Municipality might cut them on the ground that they are a nuisance; a Telephone Company could not do so without statutory authority. **Hodgins v. Toronto**, 19 A.R. 537.

Supervision.

- (e) the opening up of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such person as the municipal council may appoint, and such street, square or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition;

This sub-section, originally 62 & 63 Vict., cap. 37, sec. 1, has been a good deal altered. It formerly provided that the work should be done in such a manner as the Council directed, and that the latter might designate the place at which the poles should be erected; the words "by and at the expense of the Company" were formerly at the end of the section.

Effect of Supervision. The approval of the proper officer would not justify a breach of, or non-compliance with statutory requirements: **Bonn v. Bell Telephone Co.**, 30 O.R. 696; **Joyce v. Halifax Street Ry. Co.**, 24 N.S.R. 113; but it may be evidence of a due performance by the company of the obligations imposed by statute: **Bell Telephone Co. v. Chatham**, 31 S.C.R. 61. The necessary approval of the officer appointed to supervise the work may be evidenced by his report to Council showing it to be the only method of carrying out the undertaking: **Joyce v. Halifax Street R.W. Co.**, 21 N.S.R. 531, 17 S.C.R. 709.

Where
necessary to
cut wires or
remove poles.

- (f) if, for the purpose of removing buildings, or in the exercise of the public right of travel, it is necessary that the said wires or poles be temporarily removed by cutting or otherwise, such company shall, at its own expense, upon reasonable notice in writing from any person requiring it, remove such wires and poles; and in default of such company so doing such person may remove such wires and poles at the expense of such company;

Damage.

- (g) such company shall be responsible for all unnecessary damage which it causes in carrying out, maintaining or operating any of its said works;

Former sub-sec. 2, sec. 247.

Wires cut in
case of fire.

- (h) such company shall not be entitled to damages on account of its poles or wires being cut by

direction of the officer in charge of the fire brigade at any fire, if, in the opinion of such officer, it is advisable that such poles or wires be cut;

Former sub-sec. 3, sec. 247.

- (i) every person employed upon the work of erecting or repairing any line or instrument of such company shall have conspicuously attached to his dress a badge, on which are legibly inscribed the name of such company and a number by which he can be readily identified.

Workmen to wear badges.

Former sub-sec. 4, sec. 247.

(2) Notwithstanding anything in any Act of the Parliament of Canada or of the legislature of any province, or any power or authority heretofore or hereafter conferred thereby or derived therefrom, no telegraph or telephone line, within the legislative authority of the Parliament of Canada, shall except as hereinafter in this section provided, be constructed by any company upon, along or across any highway, square or other public place, without the legal consent of the municipality having jurisdiction over such highway, square or public place.

Consent of municipality.

(3) If any company cannot, in respect of any such line, obtain such consent from such municipality, or cannot obtain such consent otherwise than subject to terms and conditions not acceptable to the company, such company may apply to the Board for leave to exercise such powers, and upon such application shall submit to the Board a plan of such highway, square or other public place showing the proposed location of such lines, wires and poles.

Leave of Board.

Former sub-sec. 5, sec. 247, amended.

The Board has no jurisdiction to make the payment of compensation a term of an order approving the location and construction of a telephone line upon a public highway or to impose any conditions such as payment of money or rent or granting free telephones for which a municipality may contend in bargaining with a telephone company as a term or condition of such order. **Bell Telephone Co. v. City of Ottawa and County of Carleton, 22**

C.R.C. 421; **City of Windsor v. Bell Telephone Co.**, 22 C.R.C. 416, **Bell Telephone Co. v. City of London**, 24 C.R.C. 102. Under its charter and the interpretation clause of the Railway Act, 1906, sec. 2 (11) the Bell Telephone Co. has power to carry its lines along a bridge on which there is a public right of travelling, 22 C.R.C. 421, **supra**.

Powers of Board.

(4) The Board may refuse or may grant such application in whole or in part, and may change or fix the route of such lines, wires or poles, and may by order impose any terms, conditions or limitations in respect of the application which it deems expedient, having due regard to all proper interests.

Former sub-sec. 6, sec. 247, amended.

Exercise of powers.

(5) Upon such order being made, and subject to any terms imposed by the Board, such company may exercise such powers in accordance with such order, and shall in the performance and execution thereof, or in the repairing, renewing or maintaining of such lines, wires or poles, conform to and be subject to the provisions of sub-section one of this section, except in so far as the said provisions are expressly varied by order of the Board.

Former sub-sec. 7, sec. 247, amended.

Putting wires underground, etc.

(6) Notwithstanding any power or authority heretofore or hereafter conferred upon any company by or under any Act of the Parliament of Canada, or of the legislature of any province, or any other authority, the Board, upon the application of the municipality, and **upon such terms and conditions as the Board may prescribe**, may order any telegraph or telephone line, within the legislative authority of the Parliament of Canada, in any city or town, or any portion thereof, to be placed underground, and may in any case order any extension or change in the location of any such line in any city or town, or any portion thereof, and the construction of any new line, and may abrogate the right of any such company to construct or maintain, or to operate, or continue, any such line, or any pole or other works belonging thereto, except as directed by the Board; and where such a line or lines within the legislative authority of the Par-

liament of Canada and such a line or lines within the legislative authority of a province, run through or into the same city or town, and such municipality is desirous of having any such lines placed underground, and there exists in such province a provincial commission, public utilities or other board or body having power to order such a line within the legislative authority of such province to be placed underground, the Board and such provincial commission, or public utilities board or body, may by joint session or conference, or by joint board, order any such lines within such city or town, or any portion thereof, to be placed underground, and abrogate any right to carry the same on poles, and the provisions of sub-section three of section two hundred and fifty-three of this Act, with the necessary adaptation, shall apply to every such case.

Joint order
of Board
and provin-
cial commis-
sion.

This sub-section is largely new. See former sec. 247 (1), (g) and sec. 248 (2). The Board has no jurisdiction to direct that telegraph (or telephone) wires be put underground to effect an aesthetic betterment or street improvement. **Woodstock v. Great North Western Telegraph Co.**, 19 C.R.C. 429, decided under former section 247 (1) (g) and probably still binding. Since the decision in **City of Chatham v. Great North Western Telegraph Co.**, 21 C.R.C. 183, this sub-section has been amended to provide that the Board may order a telegraph or telephone line to be placed underground and an extension or change to be made in the location of any line.

In **City of Montreal v. Canadian Pacific and Great North Western Telegraph Cos.**, 24 C.R.C. 226, the Board decided that where urban development requires the placing of poles and wires underground the Board will require telegraph companies to adopt underground construction at their own expense or arrange with the municipality to rent the space required for their wires. The Board has no jurisdiction under sec. 247 (now 373) to make an order authorising a highway to be carried under an existing power line and thereby regulating the height of the wires at the crossing. **Coleman v. Toronto & N. P. Co.**, 20 C.R.C. 258.

(7) Except as provided in the last preceding sub-section, nothing in this section shall affect the right of any telegraph or telephone company to operate,

Existing
lines.

maintain, renew or reconstruct underground or overhead systems or lines, heretofore constructed. New.

Provisions
in special
Acts, etc.

(8) Nothing in this section shall authorise, or give power to authorise, any company to construct or operate any line or works along any highway or public place without the consent of the municipality having jurisdiction thereover in any case where,—

(a) the Special Act applying to such company requires such consent; or,

(b) the provisions of section three hundred and sixty-eight, three hundred and sixty-nine or three hundred and seventy apply to such company and require such consent;

and where such consent is so required the provisions respecting the same shall be complied with. R.S., c. 37, ss. 247 **part**, 248 **part**. Am.

Price and Supply of Certain Power.

In disputes
between
lessee of
water-power
and applicant
for electric-
ity Board
may fix
price.

374. (1) In any case where water-power has been acquired under lease from the Crown for the development of electrical energy, and the lessee from the Crown of such water-power and the applicant for the purchase of electrical energy so developed cannot agree as to the quantity to be sold by the lessee to the applicant, and the price to be paid by the applicant to the lessee for such quantity, or either, as the case may be, the Board shall determine and fix the quantity and the price to be paid therefor or either, as the case may be, and the lessee shall sell, supply and furnish, if the applicant shall then require it, such quantity, and at the price so determined and fixed, as the case may be.

Powers of
Board for
such
purpose.

(2) For the purpose of determining and fixing such quantity or such price, the Board may enter on and inspect the property leased from the Crown and all erections and machinery thereon, and may examine all papers, documents, vouchers, records and books of every kind, and may order and require the lessee and any other person to attend before the Board and be examined on oath and to produce all papers, documents, vouchers, records and books of every kind; and for the purpose

aforesaid, the Board shall have all such powers, rights and privileges as are vested in a superior court.

(3) This section shall not apply to any case where the water-power leased from the Crown, has been acquired for, and is used in the development of electrical energy for the direct and immediate industrial or manufacturing operations of the lessee. 1911, c. 22, s. 12.

Application
of section
limited.

Provisions Governing Telegraphs and Telephones.

375. (1) In this section unless the context otherwise requires,—

Interpreta-
tion.

“company” means a railway company or person authorised to construct or operate a railway, having authority to construct or operate a telegraph or telephone system or line, and to charge telegraph or telephone tolls, and includes also telegraph and telephone companies and every company and person within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls;

“Company.”

“Special Act” means any Act under which the company has authority to construct or operate a telegraph or telephone system or line, or which is enacted with special reference to any such system or line, and any letters patent constituting a company’s authority to construct or operate a telegraph or telephone system or line, granted under any Act, and the Act under which such letters patent were granted, and includes the **Telegraphs Act**, and any general Act relating to telegraphs or telephones.

“Special
Act.”

R.S., c. 126.

(2) Notwithstanding anything in any Act heretofore passed, all telegraph and telephone tolls to be charged by the company, and all charges for leasing or using the telegraphs or telephones of the company, shall be subject to the approval of the Board and may be revised by the Board from time to time.

Tolls sub-
ject to ap-
proval.

Exception
private
wires.

The provisions of this sub-section shall not apply to the use of telegraph or telephone wires where no toll is charged to the public.

Filing of
tariffs.

(3) The company shall file with the Board tariffs of any telegraph or telephone tolls to be charged, and such tariffs shall be in such form, size and style, and give such information, particulars and details, as the Board, from time to time, by regulation, or in any particular case, prescribes, and, unless with the approval of the Board, the company shall not charge and shall not be entitled to charge any telegraph or telephone toll in respect of which there is default in such filing, or which is disallowed by the Board: provided that any company, previous to the first day of May, one thousand nine hundred and eight, charging telegraph or telephone tolls may without such filing and approval, for such period as the Board allows, charge such telegraph or telephone tolls as such company was immediately previous to the said date authorised by law to charge, unless where the Board has disallowed or disallows such tolls.

Proviso.

Provisions
applying to
tolls.

(4) Such telegraph and telephone tolls may be dealt with by the Board in the same manner as is provided by this Act with respect to standard freight tariffs, and all the provisions of this Act, except as to publication under section **three hundred and forty-two** applicable to companies thereunder with respect to standard freight tariffs and tolls, shall in so far as they are applicable, and not inconsistent with the provisions of this section, apply to the company with respect to such telegraph and telephone tariffs and tolls.

Classification
of messages.

(5) The Board may permit the classification of telegraph, telephone and cable messages into such classes as it deems just and reasonable, and may permit different rates to be charged for such different classes.

Publication
of tariffs.

(6) The Board may, by regulation or otherwise, determine and prescribe the manner and form in which any tariff or tariffs of telegraph or telephone tolls shall be published or kept open for public inspection.

Connections
with other
systems,
power of
Board to
order.

(7) Whenever any company or any province, municipality or corporation, having authority to construct and

operate, or to operate, a telephone system or line and to charge telephone tolls, whether such authority is derived from the Parliament of Canada or otherwise, is desirous of using any telephone system or line owned, controlled or operated by the company, in order to connect such telephone system or line with the telephone system or line operated or to be operated by such first mentioned company, or by such province, municipality or corporation for the purpose of obtaining direct communication, whenever required, between any telephone or telephone exchange on the one telephone system or line and any telephone or telephone exchange on the other telephone system or line, and cannot agree with the company with respect to obtaining such use, connection or communication, such first mentioned company or province, municipality or corporation may apply to the Board for relief, and the Board may order the company to provide for such use, connection or communication, upon such terms, including compensation if any, as the Board deems just and expedient, and may order and direct how, when, where, by whom, and upon what terms and conditions such use, connection or communication shall be had, constructed, installed, operated and maintained.

(8) No order made under the next preceding subsection shall apply to the interchange of local conversations between persons using the telephones of two competing systems or lines where such systems or lines terminate upon switch-boards located within the municipal limits of the same city, town or village, except in the case of rural party line telephones in non-competitive areas, and then only when the Board deems such interchange to be desirable and practicable.

Local
conversations
over
competing
systems.

(9) Upon any such application the Board shall, in addition to any other consideration affecting the case, take into consideration the standards, as to efficiency and otherwise, of the apparatus and appliances of such telephone systems or lines, and shall only grant the leave applied for in case and in so far as, in view of such standards, the use, connection or communication applied for can, in the opinion of the Board, be made or exercised

Standards of
apparatus
to be
considered.

satisfactorily and without undue or unreasonable injury to or interference with the telephone business of the company, and where in all the circumstances it seems just and reasonable to grant the same.

Application
of provisions
as to joint
tariff.

(10) Where the telephone system or line operated by the company is used or connected, for purposes of communication as aforesaid, with the telephone system or line operated by any other company or by any such province, municipality or corporation, whether the authority of such company, province, municipality or corporation to construct and operate or to operate such telephone system or line is derived from the Parliament of Canada or otherwise, and whether such connection or communication has been previously or is hereafter established either by agreement of the parties or under an order of the Board, the provisions of this Act with respect to joint tariffs, in so far as they are applicable and not inconsistent with this section or the Special Act, shall apply to such company or companies and to such province, municipality or corporation; and the Board shall have, for the enforcement of its orders in this respect, in addition to all other powers possessed by it therefor, the power to order a discontinuance of such connection or communication between such different telephone systems or lines.

Enforce-
ment of
orders.

Working
agreements
to be
approved
by Board.

(11) All contracts, agreements and arrangements between the company and any other company, or any province, municipality or corporation having authority to construct or operate a telegraph or telephone system or line, whether such authority is derived from the Parliament of Canada or otherwise, for the regulation and interchange of telegraph or telephone messages or service passing to and from their respective telegraph or telephone systems and lines, or for the division or apportionment of telegraph or telephone tolls, or generally in relation to the management, working or operation of their respective telegraph or telephone systems or lines, or any of them, or any part thereof, or of any other systems or lines operated in connection with them or either of them, shall be subject to the approval of the Board, and shall be submitted to and approved by the Board before such

contract, agreement or arrangement shall have any force or effect.

(12) Without limitation of the generality of this sub-section by anything contained in the preceding sub-sections, the jurisdiction and powers of the Board, and, in so far as reasonably applicable and not inconsistent with this section or the Special Act, the provisions of this Act respecting such jurisdiction and powers, and respecting proceedings before the Board and appeals to the Supreme Court or Governor in Council from the Board, and respecting offences and penalties, and the other provisions of this Act, (except sections seventy-two to two hundred and seventy, two hundred and seventy-two to two hundred and eighty-two, two hundred and eighty-seven to three hundred and thirteen, three hundred and twenty-three, three hundred and forty-nine to three hundred and fifty-four, three hundred and sixty to three hundred and sixty-six, three hundred and ninety-four to four hundred and twenty-four, and four hundred and forty-nine to four hundred and fifty-seven, both inclusive in each case), shall extend and apply to all companies as in this section defined, and to all telegraph and telephone systems, lines and business of such companies within the legislative authority of the Parliament of Canada; and in and for the purposes of such application,—

Application
of provisions
of Act.

- (a) “company” or “railway company” shall mean a company as in sub-section one of this section defined;

Interpreta-
tion.

“Company.”

- (b) “railway” shall mean all property real and personal and works forming part of or connected with the telegraph or telephone system or line of the company;

“Railway.”

- (c) “Special Act” shall mean a Special Act as in sub-section one of this section defined;

“Special
Act.”

- (d) “toll” or “rate” shall mean telegraph or telephone toll;

“Toll.”

“Rate.”

- (e) “traffic” shall mean the transmission of and other dealings with telegraphic and telephonic

“Traffic.”

messages. 1908, c. 61, ss. 1-5; 1910, c. 50, s. 13. Am.

This section embodies section 1, 4, 5 and 6 of Chapter 61, statutes of 1908, repealing former sections 355 to 360. Sub-section 2 has been amended by giving the Board control of all charges for leasing or using telegraphs or telephones, and excepting private wires where no toll is charged from its application. By sub-section 5 (new) power is given to the Board to allow the classification of messages; in sub-section 7 the words "long distance" have been omitted in lines 6 and 7 before "telephone system"; sub-section 8 is new; the words "and where in all the circumstances it seems just and reasonable to grant the same" have been added to sub-section 9: sub-section 11 reproduces section 13, chapter 50, Statutes of 1910.

By the Interpretation clause, sec. 2 (29) telegraph, includes wireless telegraph.

In a recent decision, December 26, 1920, **Marconi Wireless Telegraph Co. v. Western Union and G.N.W. Telegraph Co.**, the Board held it had no jurisdiction to entertain an application by a trans-oceanic telegraph system for joint rates with a land telegraph company under the joint tariff sections.

Telegraph Tolls: Sub-Sections 3 and 4.

The Board has stated the principles on which telegraph tolls should be based and increases permitted in such tolls. **In re Telegraph Tolls**, 20 C.R.C. 1, 26 C.R.C. 65. **Town of The Pas v. G.N.W. Telegraph Co.**, 22 C.R.C. 402. The zone system has been adopted in fixing such tolls as more convenient, 20 C.R.C. at p. 22.

The Board dealt with telegraph tolls for press messages in **Western Associated Press v. C.P.R. and G.N.W. Telegraph Cos.**, 9 C.R.C. 482. It will not order special tolls for press service at unremunerative rates even though given under special agreement by another telegraph company. **Canadian Press v. G.N.W., etc., Telegraph Cos.**, 14 C.R.C. 151. In the same case an unjust discrimination in tolls for "press specials" against the maritime provinces in favor of Ontario and Quebec was found and the former rates ordered to be restored.

Tolls charged for similar services in the United States may be considered in determining what are reasonable tolls for telegraph messages in Canada; while such comparisons are informative they are not conclusive. **In re Telegraph Tolls**, 20 C.R.C. 1.

Telephone Tolls.

In a number of cases the Board has decided as to the proper toll to be charged for the use of a telephone—where a telephone in a residence is used for business purposes, the higher or business toll rather than the lower or residence toll is properly charged irrespective of the amount of user, e.g., in the case of a nurse, **Bayly v. Bell Telephone Co.**, 11 C.R.C. 190, or a doctor, **Medico-Chirurgical Society v. Bell Telephone Co.**, 16 C.R.C. 267, or a religious community, **Notre Dame des Anges v. Bell Telephone Co.**, 17 C.R.C. 277, or a market gardener, **Newman v. Bell Telephone Co.**, 17 C.R.C. 271, while a clergyman is entitled to be charged the residence toll and not the business toll. **Desroches v. Bell Telephone Co.**, 18 C.R.C. 322.

In **Lemieux v. Bell Telephone Co.**, 23 C.R.C. 141, the Board found that a charge for local calls at an attended station double the toll at a coin box booth to be unjust discrimination and ordered its removal.

The Board has jurisdiction to order connections and fix tolls for long distance business, but it has none in the case of connection for local business. **Joliette v. Bell Telephone Co.**, 21 C.R.C. 443, **Ingersoll Telephone Co. v. Bell Telephone Co.**, 22 C.R.C. 135, 31 D.L.R. 49, 53 Can. S.C.R. 583.

The Board dealt with exchange limits in **Montreal v. Bell Telephone Co.**, 15 C.R.C. 118 and **Toronto v. Bell Telephone Co.**, 15 C.R.C. 142, and in the first case with the proper basis for fixing tolls.

Jurisdiction—Facilities.

The Board's jurisdiction over telegraph and telephone companies may be termed a rate jurisdiction, not a service jurisdiction. The facilities section 312, (former section 284) is exempted from the sections of the Act made applicable by this section to such companies. The only control over extension of physical facilities *qua* physical facilities which the Board possesses in respect of the Bell Telephone Company is under the Board's powers to see to the enforcement of the special Act, (1902), ch. 41, sec. 2. **Tinkess v. Bell Telephone Co.**, 20 C.R.C. 249; **North Lancaster Exchange v. Bell Telephone Co.**, 21 C.R.C. 220. The Board has no power to discipline or remove an employee of a railway or telephone company; the matter is entirely one of internal management of the Company. **Re Anderson and Bell Telephone Co.**, 24 C.R.C. 224.

Marine Electric Telegraphs or Cables.

Marine
telegraphs
and cables,
when Act
to apply to.

376. (1) After this section is brought into effect, section three hundred and seventy-five of this Act shall extend and apply to marine electric telegraphs or cables; and,

"Telegraph."

"telegraph" in the said section, unless the context otherwise requires, shall include marine electric telegraph or cable;

"Telegraph
toll."

"telegraph toll" in the said section, unless the context otherwise requires, shall include any toll, rate or charge to be charged by the company to the public or to any person for the transmission of messages by any marine electric telegraph or cable system whereby messages are transmitted from, to or through Canada;

"Traffic."

"traffic" in the interpretation provided for by paragraph (e) of sub-section twelve of the said section, and as the application of the said section is extended by the coming into force of this section, shall include messages transmitted from Canada to any other country by means of any marine electric telegraph or cable line; or, to Canada from any other country by the like or similar means; or, through, or into, or from any part of Canada by means of any marine electric telegraph or cable lines acting in conjunction with land lines or by land lines acting in conjunction with marine electric telegraph or cable lines, by means of a through route or otherwise.

Four months
to obtain
approval of
tariffs.

(2) Every company to which this section applies shall have four months after this section comes into force within which to file and obtain approval of its tariffs and tolls; but the Board may, upon application and upon good and sufficient ground being shown, extend such time to a period not exceeding one year, including the said four months.

Coming into
force.

(3) This section shall come into force upon similar provision being made by the proper authority in the United Kingdom, and upon proclamation of the Governor in Council. 1910, c. 57. Am.

See **Marconi, etc. v. Western Union, et al.**, *supra*, sec. 375.

This section has not yet come into force. The Board has no jurisdiction over tolls charged for cable business. **In re Telegraph Tolls**, 20 C.R.C. 1 at pp. 64 and 65, 26 C.R.C. 65 at p. 89.

Government Use and Construction of Telegraphs and Telephones.

377. (1) Every railway, telegraph and telephone company, shall, when required so to do by the Governor in Council, or any person authorised by him, place at the exclusive use of the Government of Canada any electric telegraph and telephone lines, and any apparatus and operators which it has.

Government may have exclusive use.

(2) Such company shall thereafter be entitled to receive reasonable compensation for such service. R.S., c. 37, s. 290.

Compensation.

"Every railway, telegraph and telephone company" has been substituted for "every company" in former section 290.

378. The Governor in Council may, at any time, cause a line or lines of electric telegraph or telephone to be constructed along the line of any railway, for the use of the Government of Canada, and, for that purpose, may enter upon and occupy so much of the lands of the company as is necessary for the purpose. R.S., c. 37, s. 291.

Government may erect wires on railway.

Statistics and Returns.

379. (1) Every railway, telegraph, telephone and express company and every **carrier by water** shall annually prepare returns, in accordance with the forms and classifications for the time being required by the Board, of its capital, traffic and working expenditure and of all other information required.

Annual returns.

(2) Such returns shall be dated and signed by and attested upon the oath of the secretary, or some other chief officer of the company or **carrier by water**, and shall also be attested upon the oath of the president, or, in his absence, of the vice-president or manager of the company

Attestation.

or carrier by water, or shall be signed and attested by such other person or persons as the Board may direct.

Period
included.

(3) Such returns shall be made for the period beginning from the date to which the then last yearly returns made by the company or carrier by water extend, or, if no such returns have been previously made, from the commencement of the operation of the railway, or other works, or undertaking, and ending with the last day of December in the year, or other interval, for which the returns are to be made, or with such other date as the Board may direct.

Duplicate
for Minister.

(4) A duplicate copy of such returns, dated, signed and attested in manner aforesaid, shall be forwarded by such company to the Dominion Statistician within one month after the first day of February in each year, or within one month after any other date directed by the Board under the next preceding sub-section. 1909, c. 31, s. 2. Am.

Repealing former section 370, this section has been amended by specifying the different companies required to make returns, sub-sec. 1, and the addition of carriers by water in sub-secs. 1-3. The returns are now to be made to the Dominion Statistician instead of to the Minister.

Traffic
returns
monthly.

380. (1) Every railway, telegraph, telephone and express company and every carrier by water, if required by the Board so to do, shall prepare returns of its traffic monthly, that is to say, from the first to the close of the month inclusive.

Form.

(2) Such returns shall be in accordance with the forms for the time being required by the Board.

Copy to
statistician.

(3) A copy of such returns, signed by the officer of the company or carrier responsible for the correctness of such returns, shall be forwarded by the company or carrier to the Dominion Statistician within seven days from the day to which the said returns have been prepared.

Extension
of time.

(4) The Board may in any case extend the time within which such returns shall be forwarded. 1909, c. 31, s. 2. Am.

Repealing former section 371, this section has also been amended as sec. 379 by specifying the different companies as well as carriers by water, required to make returns to the Dominion Statistician instead of to the Minister.

381. (1) Every railway, telegraph, telephone and express company and every **carrier by water** shall annually, or more frequently if the Board so requires, make to the Board, under the oath of the president, secretary or superintendent of the company, or carrier, or of such other person as the Board may direct, a true and particular return of all accidents and casualties, whether to persons, or to animals or other property, which have occurred on the property or in connection with the operation of the undertaking of the company, or carrier, setting forth,—

Annual returns of accidents showing—

- (a) the causes and natures of such accidents and casualties; Causes and nature.
- (b) the points at which such accidents and casualties occurred, and whether by night or by day; and, Locality and time.
- (c) the full extent of such accidents and casualties and all the particulars thereof. Extent and particulars.

(2) Such returns shall be made for the period beginning from the date to which the then last yearly returns made by the company or carrier extend, or, if no such returns have been previously made, from the commencement of the operation of the railway, or undertaking, and ending with the last day of **December** in the then current year. Period for which returns made.

(3) A duplicate copy of such returns, dated, signed and attested in manner aforesaid, shall be forwarded by such company or carrier to the **Dominion Statistician** within one month after the first day of **February** in each year. Copies of returns.

(4) Every such company and every **carrier by water** shall also, when required by the Board return a true copy of the existing by-laws of the company, or carrier, and of its rules and regulations for the management of the company or carrier, and of its railway, or of such other undertaking or business as it is authorised to carry on. Copies of by-laws.

Form.

(5) The Board may order and direct the form in which such returns shall be made up. 1911, c. 22, s. 14. Am.

Repealing former section 372, this section has been amended as the two previous sections by specifying the different companies required to make returns and carriers by water, substituting the Board for the Minister to whom returns are to be made and altering the dates of making returns, also requiring duplicates to be sent to the Dominion Statistician.

Board
may require
further
returns as
to accidents.

382. The Board may order and direct any railway company to make up and deliver to the Board, from time to time, in addition to the said periodical returns, returns of serious accidents occurring in the course of the public traffic upon the railway belonging to such company, whether attended with personal injury or not, in such form and manner as the Board deems necessary and requires for their information with a view to public safety. R.S., c. 37, s. 373. Am.

Amended by substituting the Board for the Minister to whom returns are to be made.

Returns
privileged.

383. All returns made in pursuance of any of the provisions of the four sections of this Act last preceding shall be privileged communications, and shall not be evidence in any court whatsoever, except in any prosecution for,—

Exceptions.

- (a) default in making such returns in accordance with the requirements of this Act;
- (b) perjury in making any oath required by this Act in connection with such returns.
- (c) forgery of any such return; or,
- (d) signing any such return knowing the same to be false. R.S., c. 37, s. 374.

By section 285, *ante*, reports of accidents must be given to the Board immediately on their occurrence and the Board may declare such reports to be privileged, but unless so declared, the statute does not treat them as such. By this section returns made under the preceding four sections are declared to be privileged absolutely, except in the cases specified. Where in an accident report not otherwise privileged the names of persons who will be

witnesses for the company are given, that part of the report is privileged: **Armstrong v. Toronto Ry. Co.**, 15 P.R. 208, and where reports of officers of a railway company of an accident are in good faith prepared for the purpose of being communicated to the company's solicitor with the object of obtaining his advice thereon and enabling him to defend an action they are to be treated as privileged: **Hunter v. G.T.R.**, 16 P.R. 385, and where no litigation is actually under way; but it is reasonably anticipated, such reports may be privileged: **London Life v. Molsons Bank**, 5 O.L.R. 407; **Stocker v. C.P.R.**, 5 Que. P.R. 117.

As to when reports of accidents, etc., to a solicitor are privileged: See **Savage v. C.P.R.**, 15 Man. L.R. 401, 16 Man. L.R. 381; **Tobakin v. Dublin, etc., Tram. Co.** (1905) 2 Ir. R. 58.

Swaisland v. G.T.R., 5 D.L.R. 750; **Stapley v. C.P.R.**, 6 D.L.R. 180; **Montreal Street Ry. Co. v. Feigleman**, 7 D. L.R. 6; **Jones v. Great Central Ry. Co.** (1910), A.C. 4.

To the Board.

384. (1) The Board may, from time to time, by notice served upon any railway, telegraph, telephone or express company or any officer, servant or agent of such company, require it, or such officer, servant or agent, to furnish the Board, at or within any time stated in such notice, a written statement or statements showing in so far, and with such detail and particulars, as the Board requires,—

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------|
| (a) the assets and liabilities of such company; | Board may require returns.
Assets and liabilities. |
| (b) the amount of its stock issued and outstanding, and the date at which any such stock was so issued; | Stock. |
| (c) the amount and nature of the consideration received by such company for such issue, and, in case the whole of such consideration was not paid to such company in cash, the nature of the service rendered to or property received by such company for which any stock was issued; | Consideration for stock. |
| (d) the gross earnings or receipts or expenditure by such company during any periods specified by | Earnings and expenditures. |

the Board, and the purposes for which such expenditure was made;

Bonuses and
subsidies.

(e) the amount and nature of any bonus, gift, or subsidy, received by such company from any source whatsoever; and the source from which, and the time when, and the circumstances under which, the same was so received or given;

Bonds.

(f) the bonds issued at any time by such company, and what portion of the same are outstanding and what portion, if any, have been redeemed;

Considera-
tion.

(g) the amount and nature of the consideration received by such company for the issue of such bonds;

Liabilities.

(h) the character and extent of any liabilities outstanding chargeable upon the property or undertaking of such company; or any part thereof, and the consideration received by such company for any such liabilities, and the circumstances under which the same were created;

Cost of
construction.

(i) the cost of construction of such company's railway or other works or any part thereof;

Cost of
property.

(j) the amount and nature of the consideration paid or given by such company for any property acquired by it;

Leases and
contracts.

(k) the particulars of any lease, contract or arrangement entered into between such company and any other company or person; and,

Generally.

(l) generally, the extent, nature, value and particulars of the property, earnings and business of such company.

Board may
require
attendance
and produc-
tion.

(2) The Board may summon, require the attendance of and examine under oath, any officer, servant or agent of such company, or any other person, as to any matters included in such return, or which were required by notice aforesaid to be returned to the Board, and as to any matter or thing which, in the opinion of the Board, is relevant to such return, or to any inquiry which the Board deems it expedient to make in connection with any of the matters in this section aforesaid; and for such purposes may require the production to the Board of any

books or documents in control of such company, or such officer, servant, agent or person.

(3) Any information furnished to the Board by any such return, or any evidence taken by the Board in connection therewith, shall not be open to the public, or published, but shall be for the information of the Board only.

Information
for use of
Board only.

(4) The Governor in Council may nevertheless require the Board to communicate to him in Council any or all information obtained by it in the manner aforesaid.

And Gov-
ernor in
Council.

(5) The Board may authorise any part of such information to be made public when, and in so far as, there may appear to the Board to be good and sufficient reasons for so doing: Provided that if the information so proposed to be made public by the Board, is of such character that such company would, in the opinion of the Board, be likely to object to the publication thereof, the Board shall not authorise such information to be published without notice to such company and hearing any objection which such company may make to such publication. R.S., c. 37, s. 375.

Board may
make infor-
mation pub-
lic on notice
to company.

For penalties under this section see sections 439, 440 and 441.

Actions for Damages.

Breach of Duty Under Act.

385. Any company which, or any person who, being a director or officer thereof, or a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations or directions of the Governor in Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company, or person, shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission for the full amount of damages sustained thereby, and such damages shall not be subject to any special limitation except as express-

Damages
for breach
of duty
under Act.

ly provided for by this or any other Act. R.S., c. 37, s. 427 (2) ; 1910, c. 50, s. 12. Am.

Sub-section (1) of R.S.C., cap. 37, sec. 427, which imposed a special penalty of not less than twenty dollars and not more than five thousand dollars, is found in section 444, *infra*. The present section 385 is a re-arrangement of the rest of section 427 as amended by 9-10 Edw. VII., cap. 50, sec. 12.

In *Rex v. G.T.R. and C.P.R.*, 17 O.L.R. 601, 8 C.R.C. 453, the railway companies were indicted for failure to comply with an order of the Railway Committee as to the protection of a railway crossing.

It was held by the Ontario Court of Appeal that the defendants could not be convicted of an indictable offence, under sec. 165 of the Criminal Code because section 427 (s. 444, *infra*) read in connection with section 33 (s. 459, *infra*) does expressly provide an appropriate remedy by way of penalty for disobedience to the order of the Railway Commission, and the application of section 165 was by its very terms expressly excluded: p. 460. Sec. 431 (448 *infra*) was also held not to apply as the proceeding was not one for a penalty.

In *Rex v. Hays*, 14 O.L.R. 201, 6 C.R.C. 480, it was held that the operation of section 138 of the Criminal Code (1892) was excluded by the existence of a penalty for the offence under this section of the Railway Act. But in *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, 1 C.R.C. 511, it was held that where no punishment was provided under section 213 of the Criminal Code, still under the common law the company was liable to a fine.

See "General Note on Negligence in Operating Railways," preceding sec. 287, *ante*.

To Whom the Section Applies. The words "any person injured thereby" were considered in *LeMay v. C.P.R.*, 18 O.R. 314, 17 A.R. 293, and it was held, contrary to some expressions of opinion in *McLauchlin v. Midland Ry. Co.*, 12 O.R. 418, that they included the railway company's employees, but per Osler, J.A., at p. 301, the words should not be construed "in derogation of the common law rule as to the non-liability of the master for an injury sustained by one servant through the negligence of a fellow servant unless, in the case of a particular act or omission provided against, such extended construction is plainly required." This case was followed in *Curran v. G.T.R.*, 25 A.R. 407, at p. 411. In *Plester v. G.T.R.*, 32 O.R. 55, 1 C.R.C. 27, where a person hauling

gravel over another's farm crossing had his horse killed it was said, **obiter**, that he would be entitled to damages under this section.

It was held in **Winterburn v. Edmonton, etc., Ry.**, 1 Alta. L.R. 298, 9 C.R.C. 7, that where animals escaped from the right of way of a railway, through a defective fence, and committed damage on the lands of an adjoining owner, the company was liable under sub-sec. 2 of R.S., c. 37, s. 427, which corresponds to this section. But in **Clayton v. C.N.R.**, 17 Man. L.R. 426, 7 C.R.C. 355; **Douglass v. G.T.R.**, 9 C.R.C. 27, and **Hunt v. G.T.P. Ry.**, 18 Man. L.R. 603, 9 C.R.C. 365, it was held that sub-sec. 2 of the former section 427, being of general application, could not be interpreted to make the company liable in cases in which it was expressly relieved from liability under former sections 294 and 295.

What remains of these former sections is now found in section 386, **infra**. It should be pointed out that under the sections of the Act of 1906 just mentioned the only damage contemplated was damage caused by "any train" while the present section, viz. sec. 386, applies to any damage caused by reason of animals getting upon the lands of the company. See also **McLeod v. C.N.R.**, 9 C.R.C. 39, **Young v. Erie, etc., Ry. Co.**, 27 O.R. 530.

Cattle Getting on Railway.

386. (1) When any horses, sheep, swine or other cattle, whether at large or not, get upon the lands of the company and by reason thereof damage is caused to or by such animal, the person suffering such damage shall be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction unless the company establishes that such damage was caused by reason of,—

Damages
where
animals get
on railway.

Exceptions.

- (a) any person for whose use any farm crossing is furnished, or his servant or agent, or the person claiming such damage or his servant or agent, wilfully or negligently failing to keep the gates at each side of the railway closed when not in use; or,

Gates not
kept closed.

- (b) any person other than an officer, agent, employee or contractor of the company wilfully opening and leaving open any gate, on either

Gates wil-
fully left
open.

side of the railway provided for the use of any farm crossing, without some one being at or near such gate to prevent animals from passing through the gate on to the railway; or,

Fence taken down.

(c) any person other than an officer, agent, employee or contractor of the company taking down any part of a railway fence; or,

Animals turned on railway.

(d) any person other than an officer, agent, employee or contractor of the company turning any such animal upon or within the enclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person using all reasonable care and precaution to avoid accidents; or,

Animals ridden, etc., on railway.

(e) any person other than an officer, agent, employee or contractor of the company, except as authorised by this Act, without the consent of the company, riding, leading or driving any such animal or wilfully suffering the same to enter upon any railway, and within the fences, guards and gates thereof.

Animals killed or injured at highway crossing.

(2) Where any such animal, by reason of being at large within half a mile of the intersection of a highway with any railway at rail level contrary to the provisions of section two hundred and seventy-eight, is killed or injured by any train at such point of intersection, the owner of such animal shall not have any right of action against any company in respect of the same being so killed or injured; but contravention of the said section shall not in any other case, nor shall the fact that the company is not guilty of any negligence or breach of duty, prevent any person from recovering damage from the company under this section.

Penalty not affected.

(3) Nothing in this section shall be construed as relieving any person from the penalties imposed by section four hundred and six of this Act. R.S., c. 37, ss. 294 (3)-(5), 295; 1910, c. 50, ss. 8 and 9. Am.

It will be readily seen that this section makes a radical change in the law as it was laid down in sections 294 and

295 of the Act of 1906. The old defence afforded by section 294 (4) by proof, namely that the animals got at large through the negligence or wilful act or omission of the owner or custodian is swept away. As the law now stands, if it is shown that the injury was due to the animals getting upon the lands of the company, the company is liable, unless it can bring the case under one of the sub-sections (a), (b), (c), (d) or (e), or unless the animals got upon the intersection in contravention of section 278 and was struck there.

Where an animal got upon the right of way and thence on to the highway, where it was injured it was held that the company was not liable, inasmuch as the injury was not caused by reason of the animal getting upon the railway lands. Per Swayze, Co. J., Ont., **McDonnell v. C.P.R.**, 28th January, 1920.

Under section 406 **post**, damages are recoverable against any person by whom animals are allowed to get on the railway in the manner referred to therein.

Fires From Locomotives .

387. (1) Whenever damage is caused to any property by a fire started by any railway locomotive, the company operating the railway on which the locomotive is being used, whether guilty of negligence or not, shall be liable for such damage and may be sued for the recovery of the amount of such damage in any court of competent jurisdiction: Provided that if it be shewn that the company has used modern and efficient appliances, and has not otherwise been guilty of any negligence, the total amount of compensation recoverable from the company under this section in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed five thousand dollars; provided also that if there is any insurance existing on the property destroyed or damaged, where the company has used modern and efficient appliances and has not otherwise been guilty of negligence, the total amount of damages sustained by any claimant in respect of the destruction or damage of such property shall, for the purposes of this section, be reduced by the amount received or recoverable by or for the benefit of such claimant in respect of such insurance .

Liability
for fire
caused by
locomotive.

Proviso.

Insurance.

No action.

(2) No action shall lie against the company by reason of anything in any such policy of insurance.

Limitation.

(3) In any action or proceeding under this section the limitation of two years prescribed by section three hundred and ninety-one of this Act shall begin to run from the date of final judgment in any action brought by the assured to recover such insurance money, or, in the case of settlement, from the date of the receipt of such money by the assured, as the case may be.

Pro rata
apportion-
ment.

(4) Where the amount recoverable from the company is limited to such five thousand dollars and such sum is not sufficient to pay all the claims in full, it shall be apportioned among the claimants **pro rata** according to the claims established.

Determina-
tion of
claims by
judge.

(5) Where it is made to appear that the total amount of the claims may exceed the said sum, a judge of any superior court of competent jurisdiction may make such order as he deems fit for the proper determination and adjustment of all such claims and of the liability of the company, and, if he deems proper, may stay or consolidate any action or actions, and may direct advertisement for such claims and filing and adjudication thereof in such manner and before such tribunal, officer or person as he deems fit, and may order that after such advertisement or notice as he directs all claims not filed and established as directed shall thereafter be barred; and the costs of any such proceedings shall be paid as such judge directs.

Costs.

Restrictions.

(6) Except under or in pursuance of such an order, the company shall not be entitled to have any action under this section stayed or the amount recoverable therein lessened because of the limitation of its liability to five thousand dollars as aforesaid, nor shall any payment made by the company to any claimant otherwise than under or in pursuance of such an order prejudice the right of any other claimant to receive his due proportion of such five thousand dollars. . .

Exception.

(7) Nothing in the last two preceding sub-sections shall prevent or prejudice any action or claim against the

company for failure to use modern and efficient appliances or for other negligence.

(8) The company shall have an insurable interest in all property upon or along its route, for which it may be held liable to compensate the owners for loss or damage by fire caused by a railway locomotive, and may procure insurance thereon in its own behalf. 1911, c. 22, s. 10 (1-3). Am.

Insurable
interest in
property.

Sub-sections 5, 6 and 7 are new, the remainder of the section is substantially similar to R.S., c. 37, sec. 298. Under the former section 298 it was held that an issue might be directed as to claims under sub-sec. 1: **Fawcett v. C. P.R.**, 6 O.W.N. 634, 17 C.R.C. 313. This is now covered by sub-sec. 5.

Much of the older learning upon the subject of the liability of railway companies for damage done by fire is ordinarily not now applicable but as it may still be important in some cases it may be summarized here before discussing the effect of the statute.

In Quebec, prior to the reversal of the Quebec Courts by the Privy Council in **C.P.R. v. Roy**, 1 C.R.C. 196, the law made a railway company liable for damages done by fire at all events, and it was not necessary to prove that the company had been guilty of negligence, but the Privy Council, by reversing the judgments of the Quebec Courts, have denied the correctness of this doctrine and placed the law as to railways operating under the Dominion Railway Act, at least, upon the same footing for all provinces.

The former rules governing this subject may probably be summarized as follows:—

1. At common law a railway company being entitled to operate its trains and engines by the charter of a duly constituted authority is not liable for such fires as are ordinarily incident to the careful operation of its railway and is not liable in damages for resulting injury to property owners. This was decided as early as 1841 in **Aldridge v. Great Western Ry. Co.**, 3 Mann & G. 515, where Tindal, C.J., says at page 523: "To entitle the plaintiff to recover he must either show some carelessness by the defendants or lay facts before the jury from which it can be inferred," and the same principle runs through nearly all later English and Canadian decisions (except in Quebec): see in addition to **Oatman v. Michigan Central Ry.**

Co., 1 Can. Ry. Cas. 129; **Vaughan v. Taff Vale Ry. Co.**, 5 H. & N. 679; **Canada Central Ry. Co. v. MacLaren**, 8 A.R. 564; **Phillips v. C.P.R.**, 1 Man. L.R. 110; **Robinson v. New Co. v. Robinson**, 11 S.C.R. 688; **C.P.R. v. Roy**, 1 Can. Ry. **Co. v. Robinson**, 11 S.C.R. 688; **C.P.R. v. Roy**, 1 Can. Ry. Cas. 196.

This doctrine was once dissented from in **Powell v. Fall**, 5 Q.B.D. 597, where it was held that the defendant was liable to compensate the plaintiffs for injury done to a haystack by defendant's traction engine, though it was constructed in conformity with the English Locomotive Acts, upon the ground that the engine, being a dangerous machine, an action was maintainable at common law, and the case of **Vaughan v. Taff Vale Ry. Co.**, 5 H. & N. 679, was said to be wrongly decided; but this case has never been applied since to a fire caused by a railway engine, and in view of the later English and Canadian decisions it may be said that it is not law in Canada. The case is explained by Burton, J.A., in **Canada Central Ry. Co. v. MacLaren**, 8 A.R. at p. 583. Unless a railway company has been expressly authorised to use steam engines, it is liable for damages done by fire, though no negligence is proved: **Jones v. Festiniog Ry. Co.**, L.R. 3 Q.B. 733; **Hilliard v. Thurston**, 9 A.R. 514. The subject was discussed in **Wealleans v. Canada Southern Ry. Co.**, 21 A.R. 297, and **Michigan Central Ry. Co. v. Wealleans**, 24 S.C.R. 309, where it was conceded that had the Michigan Central Railway Company not had authority to operate over the line of the Canada Southern Railway Company, it would have been liable for damages caused by fire without proof of negligence.

2. The onus of proving negligence causing the damage is on the plaintiff: **Vaughan v. Taff Vale Ry. Co.**, *supra*; **Smith v. London and South Western Ry.**, L.R. 5 C.P. 98, at pp. 105 and 106, and 6 C.P. 14; **Senesac v. The Central Vermont Ry.**, Q.R. 9 S.C. 319, 26 S.C.R. 641; **Port Glasgow and Newark Sailcloth Co. v. Caledonian Ry. Co.**, 19 Rettie 608, 20 Rettie 35. See particularly the remarks of Lord Herschell quoted in **Oatman v. Michigan Central Ry. Co.**, 1 C.R.C. 129, by Osler, J.A., p. 137. See, however, **Farquharson v. C.P.R.**, 15 C.R.C. 190; 3 D. L.R. 288; **Kerr v. C.P.R.**, 15 C.R.C. 193; 12 D.L.R. 425, in both of which cases the finding as to cause rested on inference only. But there must be evidence from which it can fairly be inferred, not simply guessed, that the damage was caused by the defendant: **Beal v. Mich. Cen. Ry. Co.**, 10 C.R.C. 37, 19 O.L.R. 502.

3. Proof of the emission of sparks from an engine, and that fire was set thereby, is not of itself evidence of negligence sufficient to render the railway company liable. Whatever may have been the law in Quebec as appearing in the judgments of **Roy v. C.P.R.**, 1 C.R.C. 170, and in the argument of Geoffrion, Q.C., in **Senesac v. Central Vermont Ry. Co.**, 26 S.C.R., at pp. 642 & 643, it has long been held in England and the other provinces of Canada that "the railway company having the statutory power of running along the line with locomotive engines, which in the course of their running are apt to discharge sparks, no liability rests upon the company, merely because the sparks emitted by an engine have set fire to the adjoining property:" *per* Lord Herschell, **Port Glasgow and Newark Sailcloth Co. v. Caledonian Ry. Co.**, 20 Rettie 35, quoted by Osler, J.A., in **Oatman v. Michigan Central Ry. Co.**, *supra*. This is but an example of the general rule stated by Lord Blackburn in a leading case as follows: "For I take it without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorised if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorised if it be done negligently:" **Geddis v. Ban Reservoir**, 3 A.C. 430, at pp. 455 and 456; see also **Hewitt v. Ontario, etc., Ry. Co.**, 11 U.C.R. 604; **Ball v. G.T.R.**, 16 U.C.C.P. 252; **Jaffrey v. Toronto, Grey and Bruce Ry. Co.**, 23 U.C.C.P. 553; 24 U.C.C.P. 271; **Fournier v. C.P.R.**, 33 N.B.R. 565; **Jackson v. G.T.R.**, 1 C.R.C. 156.

4. If negligence on the part of the railway company is proved, the mere fact that the property injured is close to the railway lands, or that the owner allowed inflammable material to lie close to the track is not evidence of contributory negligence.

This rule has been the subject of debate. In **New Brunswick Ry. Co. v. Robinson**, 11 S.C.R. 688, Sir J. W. Ritchie states at page 690: "There was, in my opinion, evidence most proper for the consideration of the jury as to whether the plaintiff was not guilty of great negligence in placing such a combustible article as hay so near the railway, with such openings as exposed such combustible material to fire from sparks from passing locomotives." This was a *dictum*, and Strong, J., in the same case at p. 696, dissents from this view, in the following language: "I am not able to concur in the view that contributory negligence on the part of the plaintiff

was shewn by the fact that he maintained his barns in a dangerous proximity to the railway. I apprehend that a landowner has the right to make any use of his land he pleases, and is entitled to be protected in that use from the culpable negligence of others." In 1874 the law on this point was stated by Hagarty, C.J.C.P., in these words: "As to contributory negligence we do not think we can hold that the plaintiff is bound to keep or manage his land in any particular manner because a railway runs close to or along it, or that, as a matter of law he is bound to keep his land cleaner or to remove brushwood, etc., with more expedition, etc., in anticipation of the possible occurrence of fire on the railway track." He says lower down: "The jury may properly be told that every man should keep his property and premises in a reasonable, careful way." **Jaffrey v. Toronto, Grey, etc., Ry.**, 23 U.C.C.P. 553, at p. 560; see 24 U.C.C.P. 271. In **Holmes v. Midland Ry.**, 35 U.C.R. 253, it was held that plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land, and in **MacLaren v. Canada Central Ry.**, 32 U.C.C.P. 324, it was decided that the plaintiff was not bound to provide appliances to guard against defendant's negligence. This decision was affirmed on other grounds by a divided Court, **sub nom. Canada Central Ry. v. MacLaren**, 8 A.R. 564. This case was affirmed by the Privy Council, see R. & J. Digest 256 (1882-1884), **sub voce, Canada Central Co. v. MacLaren**, and 21 Canada Law Journal, 114. A majority of the Court in New Brunswick also arrived at a similar decision in **Campbell v. McGregor**, 29 N.B.R. 644, Allen, C.J., and Wetmore, J., dissenting. But a railway company, if not negligent, is not bound to take extraordinary precautions at a point where a landowner has left his property exposed to risk from fire: **Hill v. Ontario etc., Ry. Co.**, 13 U.C.R. 503. But where the jury found the plaintiff was guilty of negligence in storing hay in close proximity to defendants' railway, and such negligence was the proximate cause of the damage, he could not recover. **Cairns v. C.N.R.**, 9 C.R.C. 306, 2 S.L.R. 71. In the United States, where by statute a railway company is made liable for damages by fire, at all events without regard to negligence, the defence of contributory negligence is excluded where no fraud or intentional exposure of property is shewn: *Pierce on Railways*, 446; **G.T.R. v. Richardson**, 91 U.S. 454, but the plaintiff cannot recover when, having knowledge of the fire, he failed to use reasonable efforts to save his property from it. *Pierce on Railways*, p. 435. Speaking generally the rule as to con-

tributory negligence may probably be accurately stated as above, although as will be seen from this review there is a substantial minority of judicial opinions in favor of the opposite view.

5. Negligence may consist in:—

- (a) The use of defective engines or appliances.
- (b) The improper and negligent management of the engine or train.
- (c) Failure to remove combustible material from railway lands.

(a) **The Use of Defective Engines or Appliances.**

A portion of the remarks of Lord Herschell in **Port Glasgow and Newark Sailcloth Co. v. Caledonian Ry. Co.**, 20 Rettie, 35, already quoted, will best define the law on this point. "They (the railway company) are aware that locomotive engines are apt to emit sparks. Knowing this, they are bound to use the best practicable means according to the then state of knowledge to avoid the emission of sparks, which may be dangerous to adjoining property; and if they, knowing that the engines are liable thus to discharge sparks, do not adopt reasonable precautions, they are guilty of negligence." The following cases may also be consulted on this point: **Piggot v. The Eastern Counties Ry. Co.**, 3 C.B. 229; **Hewitt v. Ontario, etc., Ry. Co.**, 11 U.C.R. 604; **Campbell v. McGregor**, 29 N.B.R. 644; **Freemantle v. London and North Western Ry. Co.**, 10 C.B.N.S. 89, where it was held that the absence of a spark arrester constituted negligence: **Canada Central Ry. Co. v. MacLaren**, 8 A.R. 564, where the negligence consisted in a defective smoke stack: **Moxley v. Canada Atlantic Ry. Co.**, 14 A.R. 309; **Canada Atlantic Ry. Co. v. Moxley**, 15 S.C.R. 145; **Canada Southern Ry. Co. v. Phelps**, 14 S.C.R. 132; the fact that an engine is a wood burner is not of itself evidence of negligence: **Robinson v. New Brunswick Ry.**, 23 N.B.R. 323; **New Brunswick Ry. v. Robinson**, 11 S.C.R. 688, though that fact was admitted as an element for the consideration of the jury in **Moxley v. Canada Atlantic Ry.**, *supra*; nor is a diamond stack, instead of a straight stack of itself proof of negligence: **Oatman v. Michigan Central Ry. Co.**, 1 C.R. C. 129.

(b) **The Improper and Negligent Management of the Train or Engine.**

An engine is not bound to shut off steam or to take

extraordinary precautions in passing inflammable property on the owner's land: **Hill v. Ontario, etc., Ry.**, 13 U.C.R. 503, but neglect to empty the ashpan of an engine may be evidence of negligence: **McGibbon v. Northern Ry.**, 11 O.R. 307, 14 A.R. 91; or the negligent management of the engine by trying to get up speed too quickly: **Canada Southern Ry. v. Phelps**, 14 S.C.R. 132; or to run a train too heavily laden on an up grade when there was a strong wind, thereby causing the escape of an unusual quantity of sparks: **North Shore Ry. v. McWillie** (1890), 17 S.C.R. 511; but the mere fact that there was a heavy up grade near where the fire was set is not evidence of negligence: **Fournier v. C.P.R.**, 33 N.B.R. 565.

(c) **Failure to Remove Combustible Material From Railway Lands.**

The case of **Rainville v. G.T.R.**, 28 O.R. 625, 1 C.R. C. 113, 25 A.R. 242, and 29 S.C.R. 201, sufficiently explains this point and collects all the authorities. It has been said (*obiter*), that the mere existence of a brush fence maintained by the railway company and not objected to by the owner, is not evidence of negligence under this head: **Holmes v. Midland Ry.**, 35 U.C.R. 253. The existence of any trimmings: **Smith v. London, etc. Ry.**, L.R. 5 C.P. 98, L.R. 6 C.P. 14; cut and dried weeds and grass: **Rainville v. G.T.R.**; **Dutton v. C.N.R.**, 23 D.L.R. 43, 19 C.R.C. 72; a station with a platform having oil spilt on it in dry weather: **Canadian Southern Ry. v. Phelps, supra**; **Jaffrey v. Toronto, etc., Ry.**, 23 U.C.C.P. 553; may be evidence of negligence, but, as this last case holds, regard must be had to the state of the country through which the railway passes.

6. The statute 14 Geo. III cap. 78, sec. 86, Imp., relieving persons from liability for fires accidentally started by them, though in force in Ontario, does not prevent the recovery from a railway company of damages for fire negligently begun. Though neither the statute of Geo. III, nor the parent Act, 6 Anne ch. 3, sub-sections 6 and 7, of which it is an extension, appear in any of the schedules of vol. 3 of the Revised Statutes of Ontario, 1914, it appears from the decision in **Canada Southern Ry. Co. v. Phelps**, 14 S.C.R. 132, that it is in force in Ontario, but after some discussion *pro* and *con*, in **MacCallum v. G.T.R.**, 30 U.C.R. 122, 31 U.C.R. 527, and **Jaffrey v. Toronto, Grey and Bruce Ry. Co.**, 23 U.C.C.P. 553, it was decided

in **Holmes v. Midland Ry. Co.**, 35 U.C.R. 253, and **Canada Southern Ry. Co. v. Phelps**, 14 S.C.R. 132, that where negligence on the part of the railway was proved, there was no accidental fire, and consequently that the statute did not relieve the company from liability.

7. If a fire is the result of a railway company's negligence, in the absence of any special statutory limitation or exemption, it is liable for all property burnt, and not only for that which is first set alight, even though the fire spreads to the property of the third person. The great hardships upon railway companies of such unlimited liability led to an attempt to introduce a more restricted rule, and Henry, J., in a dissenting judgment after an elaborate review of the authorities in England and America, in **Canada Southern Ry. Co. v. Phelps**, 14 S.C.R. 132, contended for a less sweeping construction of the law, but the majority of the Court took a different view and held that the railway company was liable for all property to which a fire caused by it spread and which it destroyed, and this decision was followed in **Central Vermont Ry. Co. v. Stanstead, etc., Insurance Co.**, Q.R. 5 Q. B. 224; see particularly the remarks of Hall, J., at p. 250; but as already stated, a plaintiff could not recover where, having knowledge of the fire, he failed to use reasonable efforts to protect his property from it: *Pierce*, p. 435.

8. Where a fire results in the destruction of land or fixtures upon it, the action though for a tort, can only be brought in the Province in which the cause of action arose, but where movables are destroyed the action can be brought in any Province.

In **Campbell v. McGregor**, 29 N.B.R. 644, it was decided that an action could be brought in New Brunswick for an injury to land by fire committed in the Province of Quebec. This was stated by King, J., in that case at pp. 653 and 654; but while such is the general rule which governs torts other than injury to land, it was decided by the House of Lords in **Companhia de Mocambique v. British South Africa Co.** (1892), 2 Q.B. 358, (1893), A. C. 602, that this rule did not apply to injuries to real estate, and consequently in **Brereton v. C.P.R.**, 29 O.R. 57, the rule above suggested was laid down by Boyd, C., and **Campbell v. McGregor** was not followed in view of the later decisions, although the plaintiff was permitted to continue his action in Ontario for furniture destroyed in Manitoba, provided he abandoned his claim for loss of his house. The distinction between damages to land

and other torts committed out of the province was clearly drawn in **Tytler v. C.P.R.**, 29 O.R. 654, 26 A.R. 467. See also: **Winnipeg Oil Co. v. C.N.R.**, 18 W.L.R. 424.

9. The fact that the danger from fire was considered and allowed for when the railway lands were taken from the adjoining owner, does not deprive him of his right to recover for actual damages for loss from a fire subsequently occurring.

The contrary contention has been but rarely raised in Canada, but the rule as here stated appears to have been almost universally adopted in the United States: **Pierce on Railways**, pp. 432 and 433; **Pierce v. Worcester, etc., Ry.**, 105 Mass. 199; and this rule was approved by Hall, J., in **Central Vermont Ry. v. Stanstead, etc., Insurance Co.**, Q.R. 5 Q.B. 224.

10. The question of the origin of fire or of negligence on the part of the railway company must not be the result of mere conjecture or opinion, but inferences may be drawn from surroundings, circumstances or previous conduct, which will establish liability.

This rule is necessarily indefinite and is stated with hesitation, as there has been much discussion as to what should be admitted as evidence of the cause of fire or of negligence. Mere conjecture as to the cause of the fire would not be evidence proper for submission to a jury: **Canada Paint Co. v. Trainor**, 28 S.C.R. 352; **The Dominion Cartridge Co. v. Cairns**, *ibid.* 361; **Kervin v. Canada Colored Cotton Co.**, 29 S.C.R. 478, reversing **Kervin v. Canada Colored Cotton Co.**, 28 O.R. 73, 25 A.R. 36; **Beal v. Michigan Central Ry. Co.**, 10 C.R.C. 37, 19 O.L.R. 502; and opinionative testimony as to what might have occurred under given circumstances is not admissible as evidence: **Peacock v. Cooper**, 27 A.R. 128. See, however, **Tait v. C.P.R.**, 6 C.R.C. 417. The chief difficulty has centred around the question whether evidence may be given of other fires that have been set on the same line of railway. It has been decided by the Privy Council in **Canada Central Ry. Co. v. MacLaren**, 21 Canada Law Journal, 114, that evidence is admissible to show that a particular engine habitually threw more fire than the other locomotives used on the same railway, and this may perhaps be accepted as the true effect of this decision, notwithstanding the somewhat general remarks dropped by some of the learned judges who heard the case in the Divisional Court and Court of Appeal, 32 U.C.C.P. 324, and 8 A.R. 564. Where counsel for the railway company himself elicited the fact that other fires had taken

place, it was held that no objection could afterwards be taken: **Campbell v. McGregor**, 29 N.B.R. 644. In **Piggot v. Eastern Counties Ry. Co.**, 3 C.B. 229, it was held that evidence was admissible to show that other engines belonging to the same company on other occasions in passing along the line, threw sparks to a sufficient distance to reach the building subsequently burned, but the decision cannot be quoted as authority for the statement that proof of other fires started by other engines is evidence of negligence: Osler, J.A., in **Oatman v. Michigan Central Ry. Co.**, 1 O.L.R. 145, 1 C.R.C. 129, at p. 139, quoting **Groom v. G.W. Ry. Co.**, 8 Times L.R. 253, and **Earl of Shaftesbury v. London & S.W. Ry. Co.**, 11 Times L.R. 126 and 269 seems to decide that evidence may be given to show the greater frequency of fires from engines having a diamond stack compared with those equipped with a straight stack. These cases all dealt with the admissibility of such evidence; they do not, of course, decide as to its weight with a jury if allowed in evidence. In the absence of evidence of any other probable source, evidence that three locomotives of defendant passed about the time the fire started is evidence from which jury may infer that fire was started by one of them. But evidence that an entirely different engine threw an unusual quantity of sparks cannot be admitted: **Hewitt v. Ontario, etc., Ry. Co.**, 11 U.C.R. 604, and in the United States it has been held that evidence of other fires is not admissible to prove negligence: **Lake Erie, etc., Ry. Co. v. Miller**, 57 North Eastern Reporter 596, but the contrary has also been decided, see Pierce on Railroads, pp. 438 and 439. It is submitted that evidence of other fires should be carefully scrutinized before being admitted, as the existence of a grade or a curve, differences in the velocity of the wind, the combustible nature of material at other places, differences in speed or in the weight of the train load, differences in the quality of the fuel used, the management of different engineers or firemen, all are elements in considering the cause of fires, and these elements must vary greatly on each occasion, so that the probability of the same cause or combination of causes contributing to the occurrence of two or more fires is often extremely remote. Evidence that changes were made in an engine after a fire occurred would probably not be admissible: **Pudsey v. Dominion Atlantic Ry.**, 27 N.S.R. 498; **Cole v. C.P.R.**, 19 P.R. 104, though evidence of the necessity for repairs has been admitted, the Court of Appeal being divided on the subject, as also on the question whether evidence as to other fires previously started

by the same engine should be admitted: **Canada Central Ry. v. MacLaren**, 8 A.R. 564. See also: **Farquharson v. C.P.R.**, 3 D.L.R. 288, 15 C.R.C. 190; **Kerr v. C.P.R.**, 12 D.L.R. 425, 15 C.R.C. 193, 49 S.C.R. 33.

Effect of Acts of 1903, 1906 and 1919.

Since the passing of the statute the liabilities of a railway company are:

1. Unnecessary combustible material must be removed from the right of way.

2. Damages must be paid by the company not exceeding \$5,000 for fires started by the same engine on the same occasion, whether negligent according to pre-existing rules of law or not, subject to reduction of the damages by the amount recovered by the owner of the property in respect of existing insurance, where the company has used modern and efficient appliances and has not otherwise been guilty of negligence.

3. Damages are recoverable in excess of \$5,000 unless the company establishes that it has used "modern and efficient appliances" and "has not otherwise been guilty of any negligence." See **Blue v. Red Mountain Ry.**, 6 C.R.C. 219, 7 *ibid.* 140, (1909) A.C. 361.

4. The company has an insurable interest in property for whose destruction it may be held liable.

Action for damages by fire must be commenced within two years whether brought against a railway company or against its contractors: see section 391, and see also **West v. Corbett**, 15 C.R.C. 195, 41 N.B.R. 420, affirmed by the Supreme Court of Canada, 15 C.R.C. 202, 12 D.L.R. 182, 47 S.C.R. 596; **Greer v. C.P.R.**, 19 C.R.C. 47, 52, 58, *infra*.

Failure to Equip Trains Properly.

Failure to
equip trains
properly.

388. Every company which fails to comply with any requirement of this Act,—

- (a) with respect to providing and causing to be used on its trains modern and efficient apparatus, appliances or means, or any apparatus, appliance or means in this Act specified, for the providing of communication between the conductor and the engine driver, or for the checking of the speed of any train or the bringing of the same expeditiously to a standstill, or for the secure

coupling and connecting of the cars and the engine composing the train; or,

- (b) with respect to equipping its box freight cars, for the security of its employees, with outside ladders and hand-grips, or, if the Board so requires, with any other improved side attachment required by the Board; or,

Box freight cars.

- (c) with respect to adopting and using upon its rolling stock draw bars of a height determined by the Board;

Draw bars.

shall, in addition to being liable to any penalty elsewhere provided, be liable to pay to all such persons as are injured by reason of the non-compliance with such requirements, or to their representatives, such damages as they are legally entitled to, notwithstanding any agreement to the contrary with regard to any such person, unless such agreement is authorised by the law of the province in which it is made and by regulation of the Board. R.S., c. 37, s. 386. Am.

Penalty.

Former section 386 has been re-drafted without substantial amendment. Section 414 provides the penalty for failure to comply with the provisions of this section. See section 298 for requirements prescribed by this Act.

Infraction of Provision or Order Respecting Tolls.

389. (1) Every company shall, in addition to any penalty in this Act provided in respect of any infraction by the company, or any officer, servant or agent of the company, of any provision of this Act, or of any order, direction, decision or regulation made or given by the Board under this Act in respect of tolls be liable at the suit of any person injured by reason of any such infraction, to three times the amount of the actual damage which such person may be proved to have so sustained.

Infraction of order respecting tolls.

Triple damages.

(2) No action shall be commenced for the recovery of any such triple damages without the leave of the Board first being obtained. R.S., c. 37, s. 404. Am.

No action without leave of Board.

For a recovery of treble damages under a Statute see **Union Pacific Ry. Co. v. Goodridge**, 149 U.S. 680.

Injuries on Platform, Baggage or Freight Car.

No claim
for injuries
in certain
cases.

390. No person injured while on the platform of a car, or on any baggage, or freight car, in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time. R.S., c. 37, s. 282.

By section 290, *infra*, the company may make by-laws, rules and regulations respecting the travelling upon, or the using or working of the railway. The effect of such by-laws and the essentials to their validity are dealt with in the notes to that section, but the following cases arising out of persons riding on unauthorised conveyances or in unauthorised portions of the trains, may be useful.

Construction Train. Plaintiff was a servant of one of defendants' contractors, and was injured while travelling on a construction train on his return from work. A verdict in favor of the plaintiff was upheld on appeal, on the ground that while the defendants allowed their carriages to be employed in carrying the men back and forth to work, it was their duty to see that they were carried with reasonable care: **Torpy v. G.T.R.**, 20 U.C.R. 446. Where, however, a workman employed by defendants' contractors was travelling on a construction train furnished by defendants for the transportation of **materials only**, he was not permitted to recover damages for injuries due to the negligence of defendants' servants, even though the conductor had, without authority, however, allowed him to travel on it: **Graham v. Toronto, etc., Ry.**, 23 U.C.C.P. 541. If the agreement is to carry a contractor's workmen and materials during construction, the defendants will be liable for the negligence of their servants, who will not be considered fellow-servants of the plaintiff: **Sheerman v. Toronto, etc., Ry. Co.**, 34 U.C.R. 451.

Locomotive. The conductor of a special freight train was travelling on an engine contrary to the defendants' rules. He was killed in a collision, and upon action brought by his administratrix, a nonsuit was granted, which was upheld on appeal: **Stoker v. Welland Ry. Co.**, 13 U.C.C.P. 386.

A contractor of defendants was riding to his work on one of their engines with the knowledge and permission of the engineer, who, however, had no authority to allow

it. The full Court in British Columbia reversed a verdict in favor of the plaintiff, holding that the deceased was a mere licensee and there was no evidence of gross negligence on the part of defendants: **Nightingale v. Union Colliery Co.**, 2 C.R.C. 47; affirmed by the Supreme Court of Canada, 4 C.R.C. 197. With this decision should be compared the case of **Harris v. Perry** (1903), 2 K.B. 219, where, under somewhat similar circumstances, a finding of the jury that the plaintiff was on the engine with the defendants' permission, and that the latter had not used due care towards him, was upheld. In **G.T.R. v. Barnett**, 12 C.R.C. 205, (1911) A.C. 361, a trespasser on defendants' train failed to recover. See also **Diplock v. C.N.R.**, 20 C.R.C. 356, 26 D.L.R. 544, affirmed 30 D.L.R. 240, and **C.P.R. v. Lloyd Brown**, 12 C.R.C. 228.

Baggage Car. Plaintiff, who was travelling on a passenger ticket, entered the baggage car, where people frequently went to smoke; the conductor passed him twice and made no objection. It was shown that the notice required by this section was generally posted up in the car, but it was not clearly proved that it was there when plaintiff was in the car. Owing to a collision the plaintiff's arm was broken, though no one in the passenger coaches was hurt. The jury having found in his favor, the verdict was upheld, it being held that under the circumstances the exemption granted by the statute where notices are posted up, did not apply, as persons were allowed in this car to smoke, and the conductor had made no objection to the plaintiff's presence there: **Watson v. Northern Ry. Co.**, 24 U.C.R. 98.

Express Messenger. Deceased was an employee of the American Express Company, travelling on defendants' train pursuant to an agreement between his employers and the defendants. He was killed owing to the negligence of the defendants. It was held that he was in effect a passenger, and entitled to the same degree of care, and that his administratrix could recover: **Jennings v. G.T.R. Co.**, 15 A.R. 477, 13 A.C. 800.

Freight Car. Plaintiff was travelling in a caboose in charge of cattle. He stood up while shunting was being done and was hurt. Defendants' servants did not know that he had entered the car. A non-suit granted at the trial was upheld, as no negligence was proved, and it was considered that plaintiff was himself negligent in standing up when he knew that shunting was to be done, and that he could not expect the same degree of care

upon a freight train as on a passenger train: **Hutchinson v. C.P.R. Co.**, 17 O.R. 347, 16 A.R. 429.

Platform. A newsboy riding on a platform which had a defective step, in some unexplained way fell off and was killed. He was held to be a mere licensee, bound to take the platform as he found it, and his representatives could not recover: **Blackmore v. Toronto Street Ry. Co.**, 38 U.C.R. 172; but a person unable to get into a car which was greatly crowded, and forced therefore to sit on the second step of the platform, where he was injured, was allowed damages for such injuries: **Burriss v. Pere Marquette Ry. Co.**, 4 C.R.C. 251. But holding on to the bar handle on the step of a crowded car in an effort to board it was held to be contributory negligence and to preclude recovery: **Clarey v. Ottawa Electric Ry. Co.**, 21 C.R.C. 231, 33 D.L.R. 586, 38 O.L.R. 308.

In **Simpson v. Toronto and York Radial Ry. Co.**, 7 C.R.C. 218, it was held, though with some conflict of judicial opinion, that a passenger standing on the platform of a car smoking and leaning upon the gate or grating at the side, over which his head was protruded a distance of five to seven inches when expectorating, could not recover for injuries sustained by being struck on the head, in the absence of any evidence that the blow was caused by a pole or other erection for which the defendants were responsible.

Limitation and Defences.

Limitation.

391 (1) All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall, and notwithstanding anything in any Special Act may, be commenced within two years next after the time when such supposed damage is sustained, or, if there is continuation of damage, within two years next after the doing or committing of such damage ceases, and not afterwards.

The words, "and notwithstanding anything in any Special Act may" are new. Otherwise this is identical with sub-section (1) of R.S., c. 37, s. 306, except that the period allowed has been extended from one year to two years.

Limitation of Actions. This section comes down from the earliest consolidations and its prototype exists in special charters conferred prior to 1851, when the first general Railway Act, 14 & 15 Vic., cap. 51, was passed. In the consolidations down to R.S.C. cap. 109, sec. 27, the limitation given was six months: by 51 Vic., cap. 29, sec. 287, it was extended to one year, and by 1917, c. 37, s. 10, to two years.

It has been said that this clause is unconstitutional because limitations and pleading are matters of procedure, and therefore for the provinces; but so far its constitutionality has been upheld: **Zimmer v. G.T.R.**, 19 A.R. 693; **Levesque v. New Brunswick Ry.**, 29 N.B.R. 588, at pp. 604 and 613; though its validity was doubted by some of the judges in **McArthur v. Northern & Pacific Ry.**, 15 O.R. 733, 17 A.R. 86, and **Anderson v. C.P.R.**, 17 A.R. 480. At this date, however, in view of the many cases in which its validity has been assumed, it would be somewhat difficult to set it aside.

Some doubts have arisen upon the meaning of the words "damages sustained by reason of the railway," and though the interpretation of the section has been made much easier by the present statute through the insertion of the words "construction or operation" in line two, a review of the cases on the subject will be useful. Thus in the North-West Territories it was held that where goods lying in a railway freight shed were destroyed by fire, such loss was due to damage done by reason of the railway, and the limitation of six months applied: **Walters v. C.P.R.**, 1 Terr. L.R. 88. If, however, this last mentioned action is to be treated as one based upon contract, it would seem to be in conflict with **Anderson v. C.P.R.**, 17 O.R. 747, 17 A.R. 480, where Rose, J., at the trial and a Divisional Court held in an action for passengers' baggage, that this limitation clause does not apply to actions arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway." This judgment was affirmed by the Court of Appeal in 17 A.R. 480, but no extended reasons were given, and the only reference to the point is to the effect that Osler, J., thought that the section did not apply to an action of contract. In the similar case of **Great West Supply Co. v. G.T.P. Ry. Co.**, 23 D.L.R. 780, 19 C.R.C. 347, an action for breach of contract of warehousing was held not to be within the limitation and the **Walters Case** was not followed. Owing to the varying views that have prevailed,

perhaps the best explanation of the section can be furnished by setting out chronologically the chief cases in which the point has been discussed. In **Roberts v. Great Western R.W. Co.** (1857), 13 U.C.R. 615, it was decided that the similar limitation clause then in force applied to actions for damages occasioned in the exercise of the powers given to the company enabling them to construct and maintain their road, but not to claims for negligence in carrying passengers, that being a description of business that any individual might be engaged in without requiring legislative sanction for the taking or using of property of others against their will. This case was followed and discussed in **Anderson v. Canadian Pacific R.W. Co.**, *supra*. In **Follis v. The Port Hope, etc., R.W. Co.** (1859), 9 U.C.C.P. 50, an action for trespass committed by a railway during and as part of its construction was held to be within the limitation clause; as was also an action for the destruction of a horse by running over it in **Auger v. Ontario, Simcoe & Huron R.W. Co.** (1859), *ibid.*, p. 164. In this last mentioned case Richards J., at page 169, says: "There is no doubt the Courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers, even in those cases where they are permitted by their Act of incorporation to use locomotives, etc., for the conveyance of passengers and goods, etc., and to charge for such conveyance, but the liability arises in those cases from the breach of contract arising from their implied undertaking to carry safely and to take proper care of the goods, etc."

"The same principle does not apply in these cases; the right of the plaintiff does not rest in any way on contract, but is strictly an action of tort against defendants for an alleged wrong done by them in exercising the powers conferred upon them by the Act."

See also the later case of **Ryckman v. Hamilton, etc., R.W. Co.**, 10 O.L.R. 419, 4 Can. Ry. Cas. 457, where all the cases are discussed. In that case it was held that the limitation clause did not apply, the action being based on the defendants' breach of their common law duty founded on their undertaking to carry the plaintiff safely.

Compare **Sayers v. B.C. Electric Ry. Co.**, 12 B.C.R. 102; **B.C. Electric Ry. Co. v. Crompton**, 43 S.C.R. 7; **Lumsden v. T. & N.O. Ry. Co.**, 15 O.L.R. 469; **Northern Counties Trust v. C.P.R.**, 13 B.C.R. 131; **Robinson v. C.N. R.**, 19 Man. L.R. 300. **Traill v. Niagara, etc., Ry. Co.**, 380 R. 1.

Another class of action which has been held not to come within the scope of this clause is that for damages suffered by the Company's refusal to provide facilities under sec. 312. **C.N.R. v. Robinson**, 43 S.C.R. 387, 13 C.R.C. 412 (1911), A.C. 739. Cases of injury sustained while working in a gravel pit do not come within the section. **C.N.R. v. Anderson**, 45 S.C.R. 355, 13 C.R.C. 339; **Sutherland v. C.N.R.**, 21 Man. L.R. 27, 13 C.R.C. 495.

Where the action was for damages resulting from a collision with plaintiff's waggon, the negligence alleged being a failure to give the proper signals and also a defect in a level crossing, the limitation clause was applied: **Browne v. Brockville etc., Ry. Co.** (1860), 20 U.C.R. 202.

See also **G.T.R. v. Sarnia St. Ry. Co.**, 21 C.R.C. 160, 37 O.L.R. 477, where the action was for damage caused plaintiff's cars as a result of defendant's failure to maintain a diamond crossing. Where damage results to plaintiff on account of a failure to erect fences, the limitation applies: **Brown v. G.T.R.** (1865), 24 U.C.R. 350; **Levesque v. New Brunswick Ry.** (1889), 29 N.B.R. 588. Where fire was set by a locomotive on railway premises and the negligence charged was in the failure to keep it off an adjoining owner's lot, it was held that this was merely a breach of duty owed by one landowner to another, and was quite independent of any user of the railway, and the limitation did not apply: **Prendergast v. G.T.R.** (1866) 25 U.C.R. 193; but where the action was for negligently allowing dry wood and leaves to accumulate on the track, a contrary view was taken, and an action brought after the statutory period was held to be barred: **McCallum v. Grand Trunk R.W. Co.** (1870), 30 U.C.R. 122; (1871), 31 U.C.R. 527. The **Prendergast Case** was there distinguished.

The limitation was held to apply to an action for injury due to a fire on adjoining property caused by the burning on the right of way of old ties removed from the track to be replaced by new ones, this coming within the construction or operation of the railway: **Greer v. C.P.R.**, 19 C.R.C. 47, 52, 58, 19 D.L.R. 140, affirmed 23 D.L.R. 337, 31 O.L.R. 419, 32 O.L.R. 140, 51 S.C.R. 339, similarly loading old rails on flat cars is within this section, **Danyleski v. C.P.R.**, 32 D.L.R. 95, 20 C.R.C. 410, 27 Man. L.R. 364, **C.N.R. v. Pszeniczny**, 32 D.L.R. 133, 20 C.R.C. 417, 54 S.C.R. 36. An action for trespass for laying side tracks on the plaintiff's land, does not come within the

section, **Carr v. C.P.R.**, 14 C.R.C. 40, 4 D.L.R. 208, but a fire started by sparks from an improperly equipped engine does come within "construction and operation:" **West v. Corbett**, 15 C.R.C. 195, 41 N.B.R. 420, affirmed 15 C.R.C. 202, 12 D.L.R. 182, 47 S.C.R. 596. For a case of continuing damage extending the time for bringing action see **Niles v. G.T.R.**, 9 D.L.R. 379, 15 C.R.C. 73; but though an injury to land may remain as a continuing cause of damage from year to year, yet if the damage results exclusively from the original act and could have been foreseen and claimed for at the time, the period of limitations begins to run from that time: **Kerr v. Atlantic & N.W. Ry Co.**, 25 S.C.R. 197, but see **McCrimmon v. B.C. Electric Ry. Co.**, 24 D.L.R. 368, 19 C.R.C. 329. In **Tench v. Great Western Ry. Co.** (1872), 32 U.C.R. 452, the action was for a libel uttered by defendants' general manager against a conductor, and it was held that such an action was not for damage done by reason of the railway. This decision was reversed in 1873 by a judgment reported in 33 U.C.R. 8, but the point in question was not specifically dealt with, and a disposition of it was unnecessary owing to the different view of the cause of action entertained in the appeal. Where an action was brought against a railway company because its contractor took gravel from a highway, it was held that the company were liable for the trespass, and that the limitation clause did not apply, the wrong complained of being an illegal act not necessarily connected with the construction of the railway more than the appropriation of any other property to their use: **Township of Brock v. Toronto, etc., Ry. Co.** (1875), 37 U.C.R. 372. The case of **Follis v. Port Hope, etc., Ry.**, *supra*, was referred to and distinguished. Where a street railway car was driven so rapidly that plaintiff, in jumping to escape it, was injured, it was held that the injuries thus sustained were damages done by reason of the railway and the limitation applied. Moss, C.J.O., and Burton, J.A., thought that they were bound by the **Auger and Brown Cases**, *supra*, and would apparently have decided differently but for them, while Patterson, J.A., felt that the case was clearly within the section: **Kelly v. Ottawa Street Ry.** (1879), 3 A.R. 616.

A contractor for the construction of a railway for a railway company is entitled to the protection of this section: **West v. Corbett**, 15 C.R.C. 202, 12 D.L.R. 182, 47 S.C.R. 596; **Hendrie v. Onderdonk**, 34 C.L.J. 414.

The case of **Brock v. Toronto, etc. Ry.**, *supra*, was

followed in **Beard v. Credit Valley Ry.** (1885), 9 O.R. 616, where the action was for trespass in wrongfully taking earth off plaintiff's land.

The **Beard Case** in turn was followed in **Gauthier v. C.N.R.**, 14 D.L.R. 490, 16 C.R.C. 354, where an action for breach of an agreement to locate a station on the plaintiff's land in consideration of a right of way over it was held not to come within the limitation. In **Dagenais v. C.N.R.**, 17 D.L.R. 193, 19 C.R.C. 144, an action for damages for wrongful occupation by the company of the plaintiff's land which damage could not be included in a subsequent award of arbitrators was held not to arise out of the "construction or operation" and therefore not to be barred under this section.

Injuries to machinery which the railway company were carrying, due to careless handling, are not within the statute, the claim being for breach of contract: **Whitman v. Western Counties Ry.** (1884), 17 N.S.R. 405; but in **May v. Ontario, etc., Ry.** (1885), 10 O.R. 70, injuries inflicted upon a workman employed by a railway company while being carried to his work, were held to be within the section, and it was also decided that "any damage done through negligence upon a railway in the carriage of passengers and the like, is damage done by reason of the railway," provided it is done "in the course and prosecution of their business as a railway company constituted in pursuance of" the authority of any statute: Wilson, C.J., at p. 77. Where a passenger on a Credit Valley Railway car was killed in a collision with a G.T.R. engine, it was decided that the limitation of six months then prescribed by the Railway Act prevailed over the limitation of twelve months prescribed by the Fatal Accidents Act, R.S.O. 1877, cap. 128, sec. 5: **Conger v. G.T.R.** (1887), 13 O.R. 160, following **Cairns v. Water Commissioners of Ottawa** (1875), 25 U.C.C.P. 551. But see recent cases cited, *infra*. Where timber was cut by a railway company on lands adjoining its track, in pursuance of its statutory powers in that behalf, Mr. Justice Street held that the resulting cause of action was for damage done by reason of the railway, and was barred after the statutory period had expired: **McArthur v. Northern, etc., Ry.** (1886), 15 O.R. 733. This decision was affirmed on appeal by a divided Court: (1890), 17 A.R. 86. Then follows the case of **Anderson v. C.P.R.** (1889), 17 O.R. 747; (1890), 17 A.R. 480, already discussed, after which the next decision, which may be considered to be applicable to all the provinces,

though based upon the law of Quebec, is **North Shore Ry. v. McWillie** (1890), 17 S.C.R. 511, affirming **McWillie v. North Shore Ry.** (1889), M.L.R. 5 Q.B. 122, in which it was stated by Mr. Justice Gwynne, though not expressly dealt with by the other members of the Supreme Court that the "damage" referred to in the clause in question has no reference to such an action, which was for damage not occasioned by reason of the railway, but by reason of sparks being suffered to escape from an engine running upon it through the default and neglect of the company whose engine caused the damage, and that such damage is "no more damage sustained by reason of the railway than damage to goods being carried upon the railway by reason of negligence in the manner of running a train is": see page 515. This opinion is not in accord with the judgment of the Court in the **McCallum Case, supra**, and it is doubtful whether it can be accepted as authority in preference to that case where the cause of action arises in provinces other than Quebec, unless and until the principle is reaffirmed by the Supreme Court in some cases where the point squarely arises. The wording of the present section apparently in effect over-rules this case.

In **Zimmer v. G.T.R. Co.** (1892), 21 O.R. 628, Mr. Justice Robertson decided that the clause as embodied in 51 Vic., cap. 29, sec. 287, applied to the Grand Trunk Railway Company; but, though his judgment was affirmed upon other grounds by the Court of Appeal in 19 A.R. 693, the Court decided, contrary to his view, that where the cause of action arose through failure to repair a highway bridge over defendants' railway, which it was the latter's duty to maintain, the damage was not "sustained by reason of the railway," and that the limitation clause did not apply. Though the case of **Conger v. G. T.R. Co., supra**, was cited in argument, it was also held in the **Zimmer Case**, without referring to the earlier decisions, that the limitations in the Railway Act are inapplicable to cases of injuries brought under Lord Campbell's Act or the Workmen's Compensation for Injuries Act, and that in cases of conflict the latter must govern. See also **B.C. Electric Ry. Co. v. Turner**, 18 D.L.R. 430, 18 C.R.C. 193, 49 S.C.R. 470; **B.C. Electric Ry. Co. v. Gentile**, 18 C.R.C. 217, 18 D.L.R. 264, (1914), A.C. 1034. As the last decision is a judgment of the Court of Appeal, while that in the **Conger Case** was delivered by single Judge (O'Connor, J.), upon a demurrer, the latter case appears to be in effect overruled. Mr. Justice Osler, at page 703 of the report in **Zimmer v. G.T.R. Co.**, quotes the remarks of

Mr. Justice Gwynne in **North Shore Ry. Co. v. McWillie**, already referred to, with approval, and says: "It (the accident) happened solely by reason of a part of the municipal highway which the defendants were, under the circumstances, bound to keep in repair, being negligently allowed by them to be out of repair, and can with less propriety be said to be damage sustained by reason of the railway than can damage caused by a breach of their statutory duty as carriers of goods."

Levesque v. New Brunswick Ry. Co. (1889), 29 N.B. R. 588, has been already referred to in **Hendrie v. Onderdonk** (1898), 34 Canada L.J. 414, in which it was decided that a contractor for a railway incorporated by the Legislature of Ontario, and first working under the Ontario Railway Act, but which was subsequently declared to be a work for the general advantage of Canada, was as much entitled to the benefit of the shorter limitation clause of the Ontario Act as the railway company itself.

In **Findlay v. C.P.R.**, 2 C.R.C. 380; it was held that the limitation applied to actions founded on the commission of acts, not to those based on the omission of duties which defendants were bound to perform and so, where a railway ditch was left unguarded, Richardson, J., thought that the section would not apply.

The effect of the changes made in the present statute, is to limit all actions based upon a wrongful construction or operation of the railway, but not, under subsection 2, *infra*, to permit such a limitation in cases of contract, nor in actions based upon a breach of the company's duty respecting tolls.

(2) Nothing in sub-section one of this section shall apply to any action brought against the company upon any breach of contract, express or implied, for or relating to the carriage of any traffic, or to any action against the company for damages under the provisions of this Act, respecting tolls.

Exceptions—
Carriage of
traffic, tolls.

This sub-section was new in the Act of 1903 and set at rest some questions which were in doubt under earlier legislation as to whether the limitation prescribed by it applied to actions based upon contract. It embodies the decision in **Ryckman v. Hamilton, etc., Ry.**, 4 C.R.C. 457, 10 O.L.R. 419.

(3). Notwithstanding anything in any special Act or elsewhere contained, the pleadings in any action or suit against the company shall be governed by the law

Pleadings.

or rules of procedure of the court in which such action or suit is brought, and the company shall not, unless permitted by such law or rules, be entitled to plead the general issue.

This makes a radical change in the law as laid down by the old sub-section 2, allowing the general issue to be pleaded and the old plea of "not guilty by statute" is no longer available.

Company not
relieved by
inspection,
etc.

(4) No inspection under or by the authority of this Act, and nothing in this Act and nothing done, ordered or directed, or required or provided for, or omitted to be done, ordered or directed or required or provided for, under or by virtue of the provisions of this Act, shall, except in so far as a compliance with the Act or with such order or direction, or requirement or provision, constitutes a justification for what would otherwise be wrongful, relieve, or be construed to relieve, any company of or from, or in any wise diminish or affect, any liability or responsibility resting upon it by law, either towards His Majesty or towards any person, or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative, of any person, for anything done or omitted to be done by such company, or for any wrongful act, negligence or default, misfeasance, malfeasance, or nonfeasance, of such company. R.S., c. 37, s. 306; 1917, c. 37, s. 10. Am.

Former section 306 (4) redrafted. This sub-section appeared as a separate section in the Act of 1888 under the heading "Company not relieved from legal liability by inspection or anything done hereunder." It was first enacted in 20 Vict., cap. 12, sec. 17, being part of "an Act for the better prevention of accidents on railways" and in *Girouard v. C.P.R.* (in Quebec), 1 C.R.C. 343, it was cited in support of a judgment requiring greater precautions at highway crossings than those prescribed by the Act. See notes to section 308 on "Signals at Common Law." It was also employed in *C.P.R. v. Roy*, 1 C.R.C. 196, as the basis for an argument that, despite the general effect of the Railway Act in other provinces, that statute had not the effect of repealing or altering the civil law in force in Quebec, in respect to fires set by railways. As to this the Lord Chancellor says at p. 207, "Section 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statu-

tory permission to use the railway, but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorise in one part of the statute what is made actionably wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed."

While the section may have been exceedingly valuable in its original surroundings in an Act passed for the prevention of accidents, its value in a general railway enactment, which provides ample penalties and civil remedies elsewhere, for breaches of its requirements, is not apparent, and as its existence has, in the only two cases in which it has been mentioned, given rise to misconception, it is a question whether it might not better have been left out.

Offences, Penalties and Other Liability.

Disobeying Orders of Board.

392. (1) Every company and every municipal or other corporation which neglects or refuses to obey any order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, shall for every such offence, be liable to a penalty of not less than twenty dollars nor more than five thousand dollars.

Disobeying
orders of
Board.

(2) Wherever it is proved that any company has neglected or refused to obey an order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, the president, the vice-president, each vice-president where there are more than one, and every director and managing director of such company shall each be guilty of an offence for which he shall be liable to a penalty of not less than twenty dollars and not more than five thousand dollars, or imprisonment for any period not exceeding twelve months, or both, unless he proves that, according to his position and authority, he took all necessary and proper means in his power to obey and carry out, and to procure obedience to and carrying out of, such order and that he was not at fault for the neglect or refusal to obey the same.

Liability
of officers of
company.

(3) Wherever it is proved that any municipal or

Liability
of officers of
municipality
or corpora-
tion.

other corporation has neglected or refused to obey any order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, the mayor, warden, reeve or other head of such corporation, and every member of the council or other ruling or executive body of such corporation, shall each be guilty of an offence for which he shall be liable to a penalty of not less than twenty dollars and not more than five thousand dollars, or imprisonment for any period not exceeding twelve months, or both, unless he proves that, according to his position and authority, he took all necessary and proper means in his power to obey and carry out, and to procure obedience to and carrying out of, such order, and that he was not at fault for the neglect or refusal to obey the same.

Other
liability
continues.

(4) Nothing in or done under this section shall lessen or affect any other liability of such company, corporation or person, or prevent or prejudice the enforcement of such order in any other way;

Prosecution.

(5) No prosecution shall be had under this section except by leave or direction of the Board. **New.**

This is a new provision intended to make the powers of the Board more effective.

Obstructing Inspecting Engineers.

As to trans-
mission of
telegraph
messages.

393. (1) Every operator or officer employed in any telegraph office of the company, or under the control of the company, who neglects or refuses to obey, without unnecessary delay, all orders of any inspecting engineer for the transmission of messages shall, for every such offence, be liable on summary conviction to a penalty of forty dollars. R.S., c. 37, s. 405.

Penalty.

Obstructing
inspecting
engineer on
duty.

(2) Every person who wilfully obstructs any inspecting engineer in the execution of his duties shall be liable on summary conviction to a penalty not exceeding forty dollars, and, in default of payment thereof forthwith, or within such time as the convicting justice appoints, to imprisonment with or without hard labour for any term not exceeding three months. R.S., c. 37, s. 406.

Penalty.

See section 71, *ante*, also (1920) cap. 66, sec. 71A.

Purchase of Railway Securities.

394. (1) Every director of a railway company who knowingly permits the funds of any such company to be applied either directly or indirectly in the purchase of its own stock, or in the acquisition of any shares, bonds or other securities issued by any other railway company in Canada, or in the purchase or acquisition of any interest in any such stock, shares, bonds or other securities, contrary to the provisions of this Act or the **Special Act**, shall incur a penalty of one thousand dollars for each such violation.

Company not
to purchase.

Penalty.

(2) The acquisition of each share, bond or other security or interest as aforesaid shall be deemed a separate violation of this section.

Separate
offences.

(3) Such penalty shall be recoverable on information filed in the name of the Attorney General of Canada, and a moiety thereof shall belong to His Majesty, and the other moiety thereof shall belong to the informer. R.S., c. 37, s. 376. Am.

Recovery
and
application.

In sub-sec. 1, line 8, the words "or the Special Act" have been added after the words "this Act."

Apart from statute, "it is at first sight beyond the power of one trading corporation to become shareholder in another and to apply its funds for that purpose." If, however, it is authorized by its charter or special Act, it may of course do so: **Re Barneds Banking Co.**, L.R. 3 Ch. 105, at p. 112; and a railway company cannot, without express authority, purchase shares in another company: **Salomons v. Laing**, 12 Beav. 339; but, *semble*; where authorised to hold a certain number of shares in another corporation, it may take up new stock issued in respect of the holdings which it is authorized to possess: **Great Western Ry. Co. v. Metropolitan Ry. Co.**, 11 W.R. 481; nor can a railway company without express authority secure the capital of and guarantee the profit of a connecting steamboat line: **Colman v. Eastern Counties Ry. Co.**, 10 Beav. 1.

The general principle that a company without express power or necessary implication cannot buy shares of another company was discussed and re-affirmed in **Re British, etc., Assn.**, 8 Ch. D. 679.

See section 147, *ante*.

Schemes of Arrangement With Creditors.

Failure of
company to
keep or sell
copies.

395. If any railway company fails to keep at all times, at its principal or head office, printed copies of any scheme of arrangement between the company and its creditors, after such scheme has been confirmed and enrolled as provided by this Act, or to sell such copies to all persons desiring to buy them at a reasonable price, not exceeding ten cents for each copy, the company shall incur a penalty not exceeding one hundred dollars, and a further penalty not exceeding twenty dollars for every day during which such failure continues after the first penalty is incurred. R.S., c. 37, s. 424.

Penalty.

See sec. 159.

Filing and Registry.

Company
neglecting
to file.

396. Every railway company, which fails or neglects, within six months after the completion of the undertaking, or within six months after beginning to operate any completed part of the railway, as the case may be, or within such extended or renewed period as the Board at any time directs,—

Plan and
profile.

(a) to file with the Board a plan and profile of its completed railway, or of any such part thereof as is completed and in operation, and of the land taken or obtained for the use thereof; or,

Plan of
lands taken.

(b) to file in the registry offices for the respective districts and counties, in which the parts of such railway so completed, or completed and in operation, are situate, plans of the parts thereof and of the land taken or obtained for the use thereof, located in such districts and counties respectively, prepared on such a scale and in such manner, and form, and signed or authenticated in such manner, as the Board may from time to time by general regulation, or in any individual case, sanction or require;

Penalty.

shall incur a penalty of two hundred dollars, and a like penalty for each and every month during which such failure or neglect continues. R.S., c. 37, s. 378.

See sec. 175.

397. Every registrar of deeds with whom it is by this

Act required that any plan, profile, book of reference, certified copy thereof, or other document relating to the location or construction of any railway shall be deposited, who refuses or neglects,—

Registrar of
deeds
neglecting
his duty.

- (a) to receive and preserve in his office all such plans, profiles, books of reference, certified copies thereof, and other documents duly tendered to him for such deposit; or,
- (b) to endorse thereon the day, hour and minute when the same were so deposited; or,
- (c) to allow any person to make extracts therefrom and copies thereof as occasion requires, upon payment of the fees in that behalf by this Act prescribed; or,
- (d) to certify, at the request of any person, in the manner and with the particulars by this Act required, copies of any such plan, profile, book of reference or document, or such portions thereof as may be required, upon being paid therefor at the rate provided by this Act;

Receiving
and pre-
serving
documents.

Endorse-
ments.

Copies.

Certificates.

shall be liable on summary conviction to a penalty of ten dollars, and also to an action for damages at the suit of any person injured by any such refusal or neglect.

Penalty.

R.S., c. 37, s. 377.

See sec. 176.

Removing Industrial Spurs.

398. Any company or person who, without consent or order of the Board, removes any spur or branch line constructed under or pursuant to this Act for the purpose of affording railway facilities to, or in connection with, any industry or business established or intended to be established, shall be liable on conviction to a penalty not exceeding one thousand dollars. **New.** See sec. 187.

Removing
industrial
spurs
without
leave.

It was held by the Board in **Re Discontinuance of Red Mountain Line**, decided 24th January, 1922, File 30607, that this section is limited in its operation to the removal of branches or spurs constructed under sections 185 and 186, such removal, without consent of the Board, being prohibited by section 187.

Examining Mine Workings.

Refusing
to allow
examination
of mine
workings.

399. Any owner, lessee, or occupier of a mine lying under or near a railway or any of the works connected therewith, who, after the company owning or operating such railway has obtained the written permission of the Board and given twenty-four hours notice in writing in that behalf, refuses or neglects to allow any person appointed by such company for that purpose, to enter into and return from such mine or the works connected therewith and make use of any apparatus of such mine and all necessary means for discovering the distance from such railway or works connected therewith to the parts of such mine which are being worked, in order to ascertain whether such mine is being worked or has been worked so as to injure or be detrimental to such railway or works connected therewith, or to the safety thereof or of the public, shall for every such refusal or neglect be liable on summary conviction to a penalty not exceeding one hundred dollars. **New.** See sec. 198.

Matters Incidental to Construction.

Failing to
comply with
directions
as to
construction
of bridges.

400. Every railway company which fails or neglects to comply with any direction of the Governor in Council, given upon the report of the Board, requiring such company within such time as the Governor in Council directs, to construct fixed and permanent bridges, or swing, draw or movable bridges, or to substitute any of such bridges for bridges existing on the line of the company's railway, shall, for every day after the expiration of the period so fixed, during which the company fails or neglects to comply with such direction, forfeit and pay to His Majesty the sum of two hundred dollars. **R. S., c. 37, s. 379.** See sec. 249.

Penalty.

Structures
not in
conformity
with this
Act.

401. (a) If any bridge, tunnel or other erection or structure over, through or under which any railway passes is not so constructed, or reconstructed or altered, within such time as the Board may order, and thereafter so maintained, as to afford at all times an open and clear headway of at least seven feet between

the top of the highest freight car used on the railway, and the lowest beams, members or portions of that part of such bridge, tunnel, erection or structure, which is directly over the space liable to be traversed by such car in passing thereunder; or,

- (b) If, except by leave of the Board, the space between the rail level and such beams, members or portions of any such structure, constructed after the first day of February, one thousand nine hundred and four, is in any case less than twenty-two feet six inches;

Spaces
not in
conformity.

the company or owner so constructing shall incur a penalty not exceeding fifty dollars, for each day during which such company or owner wilfully refuses, neglects or omits to comply with the requirements of this Act, as to construction, reconstruction, alteration or maintenance, in this section mentioned: Provided that nothing in this section shall apply to any bridge, tunnel, erection or structure exempted by the Board from such requirements. R.S., c. 37, s. 382. Am.

Penalty.

Proviso.

This section has been amended by omitting the words "over, through or under which no trains except such as are equipped with air brakes are run" after "structure" in the second last line. See section 250.

402. Every company which erects, operates or maintains any bridge, approach, tunnel, viaduct, trestle, or any building, erection or structure, in violation of this Act, or of any order or regulation of the Board, shall for each offence incur a penalty of fifty dollars. R.S., c. 37, s. 396. See sec. 250.

Structures
in violation
of this Act.

Penalty.

403. Every railway company which, except as authorised by Special Act of the Parliament of Canada, or amendment thereof, passed previously to the twelfth day of March, one thousand nine hundred and three,—

Improper
use of
highways.

- (a) carries its railway or causes or permits the same to be carried upon, along or across an existing highway without having first obtained leave therefor from the Board; or,

(b) obstructs any such highway by its works before turning the highway so as to leave an open and good passage for carriages; or,

(c) on completion of the works fails or neglects to restore the highway to as good a condition, as nearly as possible, as it originally had;

Penalty.

shall incur a penalty of not less than forty dollars nor more than five thousand dollars for each such offence. R.S., c. 37, s. 380. Am. See sec. 255.

The words "nor more than five thousand dollars" have been added after "forty dollars" in the last subsection.

Failure to
erect
signboards
at crossings.

404. Every railway company which fails or neglects to erect and maintain, at each crossing where a highway is crossed at rail level by the railway of the company, a signboard having the words **Railway Crossing** painted on each side thereof, in letters at least six inches in length, and, in the province of Quebec, in both the English and French languages, shall incur a penalty not exceeding forty dollars. R.S., c. 37, s. 381. See sec. 267.

Penalty.

Opening Railway for Traffic.

Opening
railway
without
leave of
Board.

405. If any railway or portion thereof is opened for the carriage of traffic, other than for the purposes of the construction of the railway by the company, before leave therefor has been obtained from the Board as hereinbefore provided, the company or person to whom such railway belongs, shall forfeit to His Majesty the sum of two hundred dollars for each day on which the railway is or continues open without such leave. R.S., c. 37, s. 384. See sec. 276.

Penalty.

Safety and Care of Roadway, Etc.

Leaving
gates open.

406. (1) Every person who,—

(a) wilfully leaves open any gate on either side of the railway, provided for the use of any farm crossing, without some person being at or near such gate to prevent animals passing through it on to the railway; or,

- (b) not being an officer or employee of the company acting in the discharge of his duty, takes down any part of a railway fence; or, Taking down fences.
- (c) turns any horse, cattle or other animal upon or within the inclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person, using all reasonable care and precaution to avoid accidents; or, Turning animals into railway inclosure.
- (d) except as authorised by this Act, without the consent of the company, rides, leads or drives any horse, or other animal, or wilfully suffers any such horse or animal to enter upon the railway, and within the fences and guards thereof; Allowing animals to go upon railway.
- shall, on summary conviction, be liable to a penalty of twenty dollars for each such offence. Penalty.

(2) Every such person shall also be liable to the company for any damage to the property of the company, or for which the company may be responsible, by reason of any such act or omission. Damages to the company.

(3) Every person guilty of any offence under this section shall, in addition to the penalty and liability therein provided, be liable to pay to any person injured by reason of the commission of such offence all damages thereby sustained. R.S., c. 37, s. 407. Am. Damages to person injured.

See secs. 274 and 386. "Wilfully" has been inserted before "suffers" in sub-sec. 1 (d).

407. (1) Every railway company which fails or neglects to cause the thistles and all noxious weeds growing on the right of way, and upon land of the company adjoining the railway, to be cut down, or to be rooted out and destroyed, each year, before such thistles or weeds have sufficiently matured to seed, or which fails or neglects to do anything which it is required by law to do for the purpose of cutting down, or rooting out and destroying such thistles and weeds before they have sufficiently matured to seed, shall incur a penalty of two dollars for every day during which such failure or neglect continues. Failure to have weeds removed from right of way.

Penalty.

Municipal
officers may
remove.

(2) The mayor, reeve or chief officer of the municipality, township, county or district in which any portion of the right of way or land of the company lies, upon which the company has failed to cut down, or root out and destroy, such thistles and weeds as by law required, or to do anything which the company is by law required to do for the purpose aforesaid, or any justice of the peace in such municipality, township, county or district, may enter upon the portion of the right of way and lands aforesaid, and, by himself and his assistants or workmen, cut down, or root out and destroy, such thistles or weeds, and for that purpose cause to be done all things which the company is by law required to do.

Expenses.

(3) Such mayor, reeve, chief officer or justice of the peace may recover the expenses and charges so incurred, and the said penalty, with costs, in any court of competent jurisdiction.

Payment.

(4) Such penalty shall be paid to the proper officer of the municipality. R.S., c. 37, s. 417. See sec. 279.

Walking
on track.

408. Every person, not connected with the railway or employed by the company, who trespasses upon the yard or track of the company, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars. R.S., c. 37, s. 408. Am.

Penalty.

Former section 408 after "company" in line 2, contained the words "who walks along the track thereof" which have been replaced by the more compendious expression "who trespasses upon the yard or track of the company."

Walking on the Track. Even though a company may have known that its track was habitually used by persons who wished to reach a nearby highway, that was not construed as a license to use it, and a person injured is a trespasser and not entitled to recover for injuries he sustained while so trespassing, even though the company's train in approaching such highway had failed to give the statutory warnings: *G.T.R. v. Anderson*, 28 S.C.R. 541, reversing *Anderson v. G.T.R.*, 27 O.R. 441, 24 A.R. 672, and see *Jones v. G.T.R.*, 16 A.R. 37, 18 S.C.R. 696. *Maritime Coal Co. v. Herdman*, 25 C.R.C. 206, 49 D.L.R.

90, 59 S.C.R. 127. But where with the tacit acquiescence of the company the fence which it was required to maintain alongside its tracks had been removed, and a foot-way across its tracks habitually used, it was held that the parents of a child killed at this point might recover, because there was a neglect of duty in permitting the track to remain unfenced at this point: **Tabb v. G.T.R.**, 8 O.L.R. 203, 4 C.R.C. 1, followed **Potvin v. C.P.R.**, 4 C.R.C. 8. In Pennsylvania, under somewhat similar circumstances, a different result has been arrived at: **Baltimore, etc., Ry. Co. v. Schwindling**, 101 Penn. St. 258. In **Downing v. G.T.R.**, 49 O.L.R. 36, a boy of 8 injured while trespassing on the railway was found guilty of negligence by the jury and failed to recover damages; the **Tabb** and **Potvin** Cases were specially mentioned and distinguished. In **Ullric v. Cleveland, etc., Ry. Co.**, 13 Am. & Eng. Ry. Cas. N.S. 783, at p. 787, it was said that employees in charge of a train are entitled to assume that anyone standing or walking on the track will in due time remove himself from danger, and they are not required to stop or check the speed of the train until they become aware that he is oblivious of his peril. A large number of cases on this point are collected in 13 Am. & Eng. Ry. Cas. N.S. at pp. 770 to 825. In a peculiar case, where a person on the track stepped off to avoid a train but was pushed on again by a cow which got on the right of way owing to the neglect of the company's duty to fence, and was injured by the train, he was not allowed to succeed; **Schreiner v. Great Northern Ry. Co.**, 58 L.R.A. 75. Where a person properly in defendants' yards chose to walk between the rails instead of outside of them and was injured he was precluded by his own contributory negligence from recovering: **Phillips v. G.T.R.**, 1 O.L.R. 28, 1 C.R.C. 399, following **Callender v. Carleton Iron Co.**, 9 T.L.R. 646, 10 T.L.R. 366.

License to cross a railway does not include license to cross the line when there are trucks (cars) on it. **French v. Hills**, 24 T.L.R. 644.

409. Any person who uses any highway crossing at rail level for the purpose of passing on foot along such highway across the railway, except during the time when such highway crossing is used for the passage of carriages, carts, horses or cattle along the said highway, is liable on summary conviction to a penalty not exceeding ten dollars, if,—

Using
highway
crossings
on foot.

Penalty.

If there is a
foot bridge.

(a) the company has erected and completed, pursuant to order of the Board, over its railway, at or near or in lieu of such highway crossing, a foot bridge or foot bridges for the purpose of enabling persons passing on foot along such highway to cross the railway by means of such bridge or bridges; and,

Maintained.

(b) such foot bridge is maintained or such foot bridges are maintained by the company in good and sufficient repair. R.S., c. 37, s. 409.

See section 261, *ante*.

Non-com-
pliance with
order of
Board.

410. (1) If any company refuses or neglects to comply with any order of the Board, made upon the report of the inspecting engineer, under the authority of this Act,—

Works.

(a) directing any repairs, renewals, reconstruction, alteration or new work, material or equipment to be made, done or furnished by the company upon, in addition to, or in substitution for any portion of the railway; or,

Operation.

(b) directing that, until such repairs, renewals, reconstruction, alteration and work, materials or equipment are made, done and furnished to the satisfaction of the Board, no portion of the railway in respect of which such order is made shall be used, or used otherwise than subject to certain restrictions, conditions and terms by such order imposed; or,

Rolling
stock.

(c) condemning and forbidding further use of any rolling stock therein specified;

Penalty.

the company shall for each such refusal or neglect forfeit to His Majesty the sum of two thousand dollars.

Aiding or
abetting.

(2) Any person wilfully and knowingly aiding or abetting any such disobedience or non-compliance shall be liable therefor, upon conviction, to a penalty of not less than twenty dollars, and not more than two hundred dollars.

No prosecu-
tion without
leave of
Board.

(3) No prosecution for any penalty under this section shall be instituted without the authority of the Board first obtained. R.S., c. 37, s. 383.

See section 283, *ante*.

411. If any railway company refuses or neglects to comply with any notice in writing of any inspecting engineer, given under the authority of this Act, and duly served upon the company, forbidding the running of any train over the railway of the company, or any portion thereof, or requiring that trains be run only at such times, under such conditions and with such precautions as specified in such notice, or forbidding the running or using of any rolling stock specified in the notice, such company shall forfeit to His Majesty the sum of two thousand dollars. R.S., c. 37, s. 385.

Non-compliance with notice of engineer forbidding the running of trains.

Penalty.

See section 284, *ante*.

Notification of Accidents.

412. (1) Every railway company which wilfully or negligently omits to give immediate notice as by this Act required, with full particulars, to the Board of the occurrence, upon the railway belonging to such company, of any accident attended with serious personal injury to any person using the railway, or to any employee of the company, or whereby any bridge, culvert, viaduct or tunnel on or of the railway has been broken, or so damaged as to be impassable or unfit for immediate use, shall forfeit to His Majesty the sum of two hundred dollars for every day during which the omission to give such notice continues. R.S., c. 37, s. 412.

Omitting to give notice of accident.

Penalty.

(2) Every conductor or other employee who makes a report to the company of the occurrence of any such accident and fails, wilfully or negligently, to notify the Board of the same by telegraph as soon as possible after such accident, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars. **New.**

Conductors, etc., failing to notify Board by telegraph.

Penalty.

Operation and Equipment.

413. Every person who wilfully or negligently violates any by-law, rule or regulation of the company is liable, on summary conviction, for each offence, to a penalty not exceeding the amount therein prescribed, or if

Violation of by-laws and rules.

no amount is so prescribed, to a penalty not exceeding twenty dollars: Provided that no such person shall be convicted of any such offence, unless at the time of the commission thereof a printed copy of such by-law, rule or regulation was openly affixed to a conspicuous part of the station at which the offender entered the train, or at or near which the offence was committed. R.S., c. 37, s. 416.

Printed copy
must be
posted.

See section 295, *ante*.

Failure of
company
to properly
equip its
trains.

414. Every railway company required by this Act,—

(a) to provide and cause to be used on its trains modern and efficient apparatus, appliances and means, or any apparatus, appliances and means in this Act specified, for the providing of communication between the conductor and the engine driver, or for the checking of the speed of any train or the bringing of the same expeditiously to a standstill, or for the secure coupling and connecting of the cars and the engine composing the train; or,

Box freight
cars.

(b) to equip its box freight cars, for the security of its employees, with outside ladders and handgrips, or if the Board so requires with any other improved side attachment required by the Board; or,

Draw bars.

(c) to adopt and use upon its rolling stock draw bars of a height determined by the Board;

which fails to comply with any requirement of this Act in that behalf shall forfeit to His Majesty a sum not exceeding two hundred dollars for every day during which such default continues. R.S., c. 37, s. 386 (1).

Penalty.

See section 298, *ante*.

Blackboard.

415. (1) (a) If any railway company upon whose railway there is a telegraph or telephone line in operation wilfully neglects, omits or refuses to have a blackboard put upon the outside of the station house over the platform of the station, in some conspicuous place, at each station of such company in which there is a telegraph or telephone office; or,

(b) if, when any passenger train is overdue at any such station according to the time-table of such company, the station agent, or person in charge at such station, wilfully neglects, omits or refuses to write or cause to be written in white chalk on such blackboard a notice, in English and French in the province of Quebec, and in English in the other provinces, stating to the best of his knowledge and belief the time when such overdue train may be expected to reach such station; or,

Notice of
overdue
trains.

(c) if, when there is any further change in the expected time of arrival, such station agent, or person in charge of the station, wilfully neglects, omits or refuses to write or cause to be written on the blackboard, in like manner, a fresh notice stating to the best of his knowledge and belief the time when such overdue train may then be expected to reach such station;

Further
notice.

such company shall be liable, upon summary conviction, to a penalty not exceeding five dollars for each such wilful neglect, omission or refusal.

Penalty.

(2) Such station agent or person in charge at any such station shall likewise be liable to a penalty not exceeding five dollars for every wilful neglect, omission or refusal to write or cause to be written upon such blackboard any of such notices as hereinbefore required. R. S., c. 37, s. 395. Am.

Station
master also
liable.

See section 303, *ante*.

416. Every officer or employee of any railway company who directs or knowingly permits any freight, merchandise or lumber car to be placed in any passenger train, in the rear of any passenger car in which any passenger is carried, is guilty of an indictable offence. R.S., c. 37, s. 387.

Freight car
in rear of
passenger
car.

Penalty.

See section 304, *ante*.

417. (1) A company shall be liable to a penalty not exceeding four hundred dollars, if when the railway passes over any navigable water or canal by means of a

Penalty for
not stopping
at swing
bridges.

draw or swing bridge which is subject to be opened for navigation, any train of the company upon such railway is not brought to a full stop before coming on or crossing over such bridge, or if such train thereafter proceeds before a proper signal has been given for that purpose.

Board may permit.

(2) This section shall not apply in the case of any bridge over which, by order of the Board under the authority of this Act, engines and trains are permitted to pass without stopping. R.S., c. 37, s. 389.

See section 305, *ante*.

Employee of company failing to comply.

418. Every employee of the company who fails to comply with the rules of the company made for carrying into effect the provisions of this Act with regard to the stopping of trains before crossing any such draw or swing bridge, or for preventing such trains from proceeding over any such bridge before a proper signal has been given for that purpose, shall be liable to a penalty not exceeding four hundred dollars, or to six months' imprisonment, or to both. R.S., c. 37, s. 390.

Penalty.

See section 305, *ante*.

Penalty for failure.

419. (1) The company shall incur a penalty of eight dollars if, when any train of the company is approaching a highway crossing at rail level,—

To sound whistle.

(a) the engine whistle is not sounded at least eighty rods before reaching such crossing; and,

And ring bell.

(b) the bell is not rung continuously from the time of the sounding of the whistle until the engine has crossed the highway.

Damages.

(2) The company shall also be liable for all damage sustained by any person by reason of any failure or neglect to so sound the whistle or ring the bell.

Exception.

(3) Where a municipal by-law of a city or town prohibits such sounding of the whistle or such ringing of the bell in respect of any such crossing or crossings within the limits of such city or town, such by-law if approved by order of the Board shall, to the extent of such prohibition, relieve the company from any penalty or liability under this section. R.S., c. 37, s. 391. Am.

See section 308.

Sub-sec. 3 reproduces sub-sec. 2 of section 308, replacing the corresponding sub-section 3 in former section 391.

420. Every employee of the company whose duty it is to sound the whistle or ring the bell at any such highway crossing, who neglects to perform such duty as required by this Act, shall for each offence incur a penalty of eight dollars. R.S., c. 37, s. 392.

Employee neglecting to sound bell or whistle.

Penalty.

It is important to note that provision is now made by section 308 for cities or towns passing by-laws prohibiting whistling or ringing the bell within their limits. Such by-laws have frequently been passed; but as the provision of the former Railway Act required the use of whistles and bells, it was difficult to set up a municipal ordinance in contravention of the express provisions of a statute having sole power to legislate for Federal railways. Under the earlier statute also the bell was required to be rung *or* the whistle sounded; whereas, under the present Act both signals are required, though both need not be continuously employed until the crossing has been reached.

Section 301 requires every locomotive to be equipped with a bell weighing at least thirty pounds and with a steam whistle.

By the Board's general order No. 199, dated 24th July, 1917, every Dominion Railway is required to equip its locomotives used in road service between sunset and sunrise with headlights which will enable persons with normal vision in the cab of a locomotive under normal weather conditions to see a dark object the size of a man for a distance of 1,000 feet or more ahead of the locomotive. See *Zuvelt v. C.P.R.*, 12 C.R.C. 420, 23 O.L.R. 602.

421. (1) The company shall incur a penalty of one hundred dollars if,—

Penalty for—

- (a) any train or engine of the company passes over any crossing where two main lines of railway, or the main tracks of any branch lines, cross each other at rail level, whether they are owned by different companies or by the same company, before a proper signal has been received by the conductor or engineer in charge of such train or engine, from a competent per-

Crossing level railway crossing without signal.

son or watchman in charge of such crossing, that the way is clear; or,

Train not
stopping.

- (b) any train of the company, before it passes over any such crossing, is not brought to a full stop, unless engines and trains are, by order of the Board under the authority of this Act, permitted to pass over such crossing without stopping; or,

Excessive
speed in
thickly
peopled
places
where track
not fenced.

- (c) any train of the company passes in or through any thickly peopled portion of any city, town or village at a speed greater than ten miles an hour, unless the track is fenced or properly protected in the manner prescribed by this Act, or unless permission to pass at greater speed is given by some regulation or order of the Board; or,

Over
highway
crossings
in thickly
peopled
places.

- (d) any train of the company passes over any highway crossing at rail level in any thickly peopled portion of any city, town or village at a speed greater than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board; or,

Over
highway
crossing
where
accident has
happened.

- (e) any train of the company passes over any highway crossing at rail level at a speed greater than ten miles an hour, if at such crossing, subsequent to the first day of January, one thousand nine hundred and five, a person or vehicle using such crossing, or an animal being ridden or driven over the same, has been struck by a moving train, and bodily injury or death thereby caused to such person or to any other person using such crossing, unless and until such crossing is protected to the satisfaction of the Board; or,

(f) any train of the company passes at a speed greater than ten miles an hour over any highway crossing at rail level in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with; or,

Over highway crossing not protected as ordered.

(g) whenever in any city, town or village, any train of the company not headed by an engine is allowed to pass over or along a highway at rail level which is not adequately protected by gates or otherwise, the company does not station on that part of the train, which is then foremost, a person who shall warn persons standing on or crossing or about to cross the track of such railway.

Moving reversely without warning.

(2) Every company operating an electric street railway shall incur a penalty of one hundred dollars if;—

Electric railway companies.

(a) any electric car of such company passes over any crossing, where its line of railway crosses any line of railway subject to the provisions of this Act, at rail level, before a proper signal has been received by the conductor in charge of such electric car, from a competent person or watchman in charge of such crossing, that the way is clear; or,

Crossing at rail level without signal from watchman.

(b) if there is no competent person or watchman in charge of such crossing, the conductor, before crossing the same, does not go forward and see that the track to be crossed is clear, before giving the signal to the motorman that the way is clear and to proceed; or,

Or from conductor if no watchman.

(c) any such electric car, before it passes over such crossing, is not brought to a full stop, unless electric cars are by order of the Board under the authority of this Act permitted to pass over such crossing without stopping. R.S., c. 37, s. 393; 1917, c. 37, s. 13. Am.

Not stopping.

See section 310, *ante*.

Obstructing
highway.

422. (1) Whenever at any highway crossing at rail level any engine, tender or car, or any part thereof, is wilfully allowed by the company, its officers, agents or employees to stand on any part of such highway for a longer period than five minutes at one time, or, in shunting, to obstruct public traffic for a longer period than five minutes at one time, every officer, agent or employee of the company, who has directly under or subject to his control, management or direction any such engine, tender or car, shall be liable on summary conviction to a penalty not exceeding fifty dollars, and the company shall also be liable to a like penalty: Provided that, if the offence is in the opinion of the court excusable, the prosecution for the penalty may be dismissed and the costs shall be in the discretion of the court. R.S., c. 37, s. 394.

Penalty.

When
observing
rules of
company
causes
obstruction.

(2) No employee shall be liable to such penalty if he proves that the carrying out or observing of the rules of the company was the cause of such obstruction, and in such case the company and its superintendent or other officer in charge of the operation of the railway, or of the division thereof upon which such obstruction occurs, shall each be guilty of the offence mentioned in this section and liable to a penalty not exceeding two hundred dollars. 1917, c. 37, s. 14.

To justify conviction, obstruction must be wilful and must be by one engine, train or car, not successively by several. *Rex v. G.T.R.*, 18 C.R.C. 74, 18 D.L.R. 323.

Intoxication of Employees.

Intoxication
of railway
employees.

423. Every conductor, locomotive engineer, train dispatcher, telegraph operator, station agent, switchman, signal man, bridge tender or any other person who is intoxicated, or under the influence of liquor, while on duty, in charge of or in any employment having to do with the movement of trains upon any railway, is guilty of an offence, and shall be punished by fine, not exceeding four hundred dollars, or imprisonment, not exceeding five years, or both, in the discretion of the court before which the conviction is had, and according as such court considers the offence proved to be more or less grave as

Penalty.

causing injury to any person or property, or as exposing or likely to expose any person or property to injury, although no actual injury occurs. R.S., c. 37, s. 413.

424. Every person who sells, gives or barter any spirituous or intoxicating liquor to or with any servant or employee of any company, while on duty, is liable on summary conviction to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a period not exceeding one month, or to both. R.S., c. 37, s. 414.

Selling
liquor to
railway
employees
on duty.

Penalty.

See **King v. Treanor**, 18 O.L.R. 194.

Traffic Tolls and Tariffs.

425. (1) If any company or any director or officer thereof, or any receiver, trustee, lessee, agent or person, acting for or employed by such company, either alone or with any other company or person,—

Contra-
ven-
tions in
respect of
tolls.

- (a) wilfully does, or causes to be done, or willingly suffers to be done, any act, matter or thing, contrary to any order, direction, decision or regulation of the Board made or given under this Act, in respect of tolls; or,
- (b) wilfully omits or fails to do any act, matter, or thing thereby required to be done; or,
- (c) causes or willingly suffers or permits any act, matter or thing, so directed or required to be done, not to be so done; or,
- (d) contravenes any such order, direction, decision or regulation, or any of the provisions of this Act, in respect of tolls;

such company, director, officer, receiver, trustee, lessee, agent or person shall for each such offence be liable to a penalty of not more than one thousand dollars, and not less than one hundred dollars.

Penalty.

(2) No prosecution shall be had or instituted for any such penalty without the leave of the Board first being obtained. R.S., c. 37, s. 398.

Prosecution
by leave.

The section is taken largely from the Interstate Commerce Act, section 10 (1), (amended March 2, 1889, June 18, 1910, and February 28, 1920), omitting the provision for a fine not exceeding \$5,000 for each offence

which was made a misdemeanour punishable in any district court of the United States within whose jurisdiction such offence is committed; also the provision for imprisonment of the offender for a term not exceeding two years where the offence is an unlawful discrimination in rates, fares or charges.

Giving free
passes, etc.

426. (1) Any company or any officer or agent thereof, or any person acting for or employed by such company, who, in contravention of the provisions of this Act, directly or indirectly, issues or gives any free ticket or free pass, whether for a specific journey or periodical or annual pass, or who arranges for or permits the transportation of passengers except on payment of the fares properly chargeable for such transportation under the tariffs filed under the provisions of this Act, and at the time in effect, shall for each offence be liable to a penalty not exceeding one thousand dollars and not less than one hundred dollars, and any person other than as provided by this Act who uses any such free ticket or free pass, whether for a specific journey or periodical or annual pass, shall be subject to a like penalty.

Using free
passes.

Prosecution
by leave.

(2) No prosecution shall be had or instituted for any such penalty without the leave of the Board first being obtained. **New.** See sections 345-7.

False billing,
etc., by
company.

427. (1) Any company or any officer or agent thereof, or any person acting for or employed by such company, who, by means of false billing, false classification, false report of weight, or by any other device or means, knowingly, wilfully or willingly suffers or permits any person or persons to obtain transportation for goods at less than the required tolls then authorised and in force on the railway of the company, shall for each offence be liable to a penalty not exceeding one thousand dollars and not less than one hundred dollars.

Penalty.

Prosecution
by leave.

(2) No prosecution shall be had or instituted for any such penalty without the leave of the Board first being obtained. R.S., c. 37, s. 399.

Sub-section 1 is copied substantially from sub-section 2 of section 10, Interstate Commerce Act, *supra*, omitting its provisions that the offender shall be deemed guilty of a misdemeanour, and upon conviction in any

court of competent jurisdiction of the United States within the district in which such offence was committed, be subject to a fine not exceeding \$5,000, or imprisonment for not more than two years, or both.

428. (1) Any person, or any officer or agent of any incorporated company, who delivers goods for transportation to such company, or for whom as consignor or consignee the company transports goods, who knowingly or wilfully, by false billing, false classifications, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the company, its agent or agents, obtains, **or knowingly or wilfully attempts to obtain**, transportation for such goods at less than the regular tolls then authorised and in force on the railway shall, for each offence, be liable to a penalty not exceeding one thousand dollars and not less than one hundred dollars.

False billing,
etc., by
any person.

Penalty.

(2) The Board may make regulations providing that any such persons or company shall, in addition to the regular toll, be liable to pay to the company a further toll not exceeding fifty per centum of the regular charge.

Further toll.

(3) The company may, and when ordered by the Board shall, open and examine any package, box, case or shipment, for the purpose of ascertaining whether this section has been violated.

Opening of
packages.

(4) No prosecution shall be had or instituted for any such penalty without the leave of the Board first being obtained. R.S., c. 37, s. 400. Am.

Prosecution
by leave.

In sub-sec. 1, line 9, the words "or knowingly or wilfully attempts to obtain" have been added after "obtains." This sub-section is also based upon sub-sec. 3 of section 10 of the Interstate Commerce Act, *supra*, with corresponding modifications as to the last two sections.

429. (1) Any person or company, or any officer or agent of any company,—

Unjust dis-
crimination.

(a) who offers, grants or gives, or solicits, accepts or receives any rebate, concession, or discrimination in respect of the transportation of any traffic by the company, whereby any such traffic is, by any device whatsoever, transported at a

less rate than that named in the tariffs then in force; or,

(b) for whom the company or any of its officers or agents, is by any such means induced to transport traffic, and thereby to discriminate unjustly in favour of any such person, company, officer or agent as against any other person or company; or,

(c) who aids or abets the company in any unjust discrimination;

Penalty. shall for each offence be liable to a penalty not exceeding one thousand dollars and not less than one hundred dollars.

Prosecution by leave. (2) No prosecution shall be had or instituted for any such penalty without the leave of the Board first being obtained. R.S., c. 37, s. 401.

The section follows sub-section 3 of section 10 Inter-State Commerce Act, *supra*, with similar omissions.

The offence of "false billing" is complete when the property is delivered for transportation, and such transportation to the place of destination is not essential to constitute the offence. The gist of the offence is the fraudulent act by which the lower rate is secured for the transportation of the property. **Davis v. United States**, 104 Fed. Rep. 136.

The remedy of the shipper against the carrier to recover damages at common law remains until the Legislature enacts a statutory remedy. In such case the statutory remedy supersedes the common law remedy unless the statute expressly declares such remedy to be cumulative and not exclusive. **Windsor Coal Co. v. Chicago Ry. Co.** (1892), 52 Fed. Rep. 716.

Departure from tolls in tariff.

430. (1) If the company files with the Board any tariff, and such tariff comes into force and is not disallowed by the Board under this Act, or if the company participates in any such tariff, any departure from the tolls in such tariff, when so in force, shall, as against such company, its officers, agents or employees, be an offence under this Act.

Offence.

Prosecution by leave.

(2) No prosecution shall be had or instituted in respect of any such offence without the leave of the Board first being obtained. R.S., c. 37, s. 402.

431. (1) All goods carried or being carried over any continuous route, from a point in Canada through a foreign country into Canada, operated by two or more companies whether Canadian or foreign, shall, unless such companies have filed with the Board a joint tariff for such continuous route, be subject upon admission into Canada, to Customs duties, as if such goods were of foreign production and coming into Canada for the first time.

Neglect to
file joint
tariff.

Goods sub-
ject to
Customs
duties.

(2) Such goods shall be subject to a Customs duty of thirty per centum of the value thereof, if they would not be subject to any Customs duty in case they were of foreign production, and coming into Canada for the first time.

30 per cent.

(3) If any such duty is paid by the consignor or consignee of such goods, the same shall be repaid on demand to the person so paying, by the company or companies owning or operating so much of such continuous line or route as lies within Canada. R.S., c. 37, s. 397.

Payable by
company.

See section 338, *ante*.

432. Every person who,—

- (a) sends by any railway any gunpowder, dynamite, nitroglycerine, or any other goods which are of a dangerous or explosive nature, without distinctly marking their nature on the outside of the package containing the same, and otherwise giving notice thereof in writing to the station agent or employee of the company whose duty it is to receive such goods, and to whom the same are delivered; or,

Sending of
explosives.

- (b) carries or takes upon any train any such goods for the purpose of carriage;

Taking them
on train.

shall be liable on conviction to a penalty not exceeding two thousand dollars or imprisonment for any period not exceeding two years, or both. R.S., c. 37, s. 410. Am.

Penalty.

See sec. 349. The penalty has been changed from that of five hundred dollars for each offence in the former Act.

Carrying
dangerous
goods.

433. Every company which carries any goods of an explosive or dangerous nature except in conformity with the regulations, or an order, made by the Board in that behalf, shall for each such offence incur a penalty of five hundred dollars. R.S., c. 37, s. 411. Am.

See section 349.

By former section 411 the cars must be specially designated with the words Dangerous Explosives; now the Board regulates the traffic. Formerly Express Companies could exercise their discretion in refusing to carry by express any particular commodity. See **Canadian and Dominion Express Cos. v. Acetylene Gas Co.**, 9 C.R.C. 172.

In **Rex v. Michigan Central Ry. Co.**, 10 O.W.R. 660, on indictment for carrying goods of a dangerous nature which were the cause of serious damage, the company was found guilty and a fine of \$25,000.00 was imposed; see section 287, now 350.

Refusing to
check bag-
gage.

434. If any railway company improperly refuses upon demand to affix a check to any parcel of baggage, having a handle, loop or suitable means for attaching a check thereupon, delivered by a passenger to the company for transport, or to deliver a duplicate of such check to such passenger, the company shall be liable to such passenger for the sum of eight dollars recoverable in a civil action. R.S., c. 37, s. 388. See section 352, *ante*.

Penalty.

Opening
package with
intent to
steal con-
tents.

435. Every person who,—

- (a) unlawfully bores, pierces, cuts, opens, enters or otherwise injures any car or any cask, can, bottle, box, case, sack, wrapper, package, container, or rolls of goods in or about any car, wagon, boat, vessel, warehouse, station house, wharf, quay or premises of or belonging to any company;
- (b) unlawfully breaks the seal upon any car on any railway; or,
- (c) unlawfully drinks or wilfully spills or allows to run to waste any liquids;

Drinking or
wasting
liquor.

is liable, on summary conviction, to a penalty not exceeding five hundred dollars, or to imprisonment with or without hard labour, for a term not exceeding one year, or to both. R.S., c. 37, s. 426. Am.

Penalty.

Express Business.

436. Every company which carries or transports, and every officer or employee thereof who directs or knowingly permits to be carried or transported, any goods by express,—

Carrying by express without filing tariff, etc.

(a) unless and until the tariff of express tolls therefor or in connection therewith has been submitted to and filed with the Board in the manner required by this Act; or,

(b) in the case of competitive tariffs, unless such tariffs are filed in accordance with the rules and regulations of the Board made in relation thereto; or,

(c) in any case where such express tolls in any tariff has been disallowed by the Board;

shall be liable to a penalty not exceeding one hundred dollars for each such offence. R.S., c. 37, s. 403.

Penalty.

Statistics and Returns.

437. (1) Every railway, telegraph, telephone or express company that fails or neglects to prepare and furnish to the Board within such time and in such manner and form, and in accordance with such classifications, and with such particulars and verification, as by or under this Act are required or intended,—

Failure to furnish returns to Minister.

(a) any return of its capital, traffic and working expenditure, or of any other information required as indicated in the forms for the time being required by the Board; or,

Capital, traffic and working expenditure.

(b) any monthly return of its traffic in accordance with the forms for the time being required by the Board, if such monthly return is required by the Minister; or,

Monthly traffic.

(c) any other information which may be from time to time required by the Board under this Act;

Other information.

shall incur a penalty not exceeding ten dollars for every day during which such default continues.

Penalty.

(2) Every person who knowing the same to be false in any particular, signs any such return, is guilty of an

Signing false return.

offence punishable on summary conviction. R.S., c. 37, s. 419. Am.

See section 379, *ante*.

Schedule 1 was repealed by 8-9 Edw. VII., ch. 31, sec. 3: forms are now obtainable from the Minister. See sec. 379, *ante*.

Returns to
Statistician.

438. Any railway, telegraph, telephone or express company that fails or neglects to deliver to the Dominion Statistician within the time provided in this Act or when required by the Board, and in the form ordered and directed by the Board, or specified in this Act,—

Accidents.

(a) a true and particular return of all accidents and casualties, whether to persons, or to animals or other property, which have occurred on the property of the company, or in connection with the operation of the undertaking of the company setting forth the particulars and verified in manner as by this Act required; or,

By-laws,
rules and
regulations.

(b) if required by the Board, a true copy of the existing by-laws of the company and of its rules and regulations for the management of the company and of its railway or such other undertaking or business as it is authorised to carry on, within fourteen days after having been so required by the Board; or,

Additional
returns of
serious ac-
cidents.

(c) in the case of a railway company, any other or additional returns of serious accidents occurring in the course of the public traffic on the railway, if thereunto required with a view to public safety by the Board, within fourteen days after the same have been so required;

shall forfeit to His Majesty the sum of one hundred dollars for every day during which the company so neglects to deliver such return. R.S., c. 37, s. 420. Am.

Penalty.

Refusal to
make returns
required by
Board.

439. (1) If the Board at any time, by notice served upon any railway, telegraph, telephone or express company or any officer, servant or agent of such company, requires such company or such officer, servant or agent to furnish to the Board, at or within any time stated in such notice, a written statement or statements showing

in so far and with such detail and particulars as the Board requires,—

- | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| (a) the assets and liabilities of such company; | Assets and liabilities. |
| (b) the amount of such company's stock issued and outstanding and the date at which any such stock was so issued; | Stock. |
| (c) the amount and nature of the consideration received by such company for such issue, and in case the whole of such consideration was not paid to such company in cash, the nature of the service rendered to or property received by such company for which any stock was issued; | Consideration therefor. |
| (d) the gross earnings or receipts or expenditure by such company during any period specified by the Board, and the purposes for which such expenditure was made; | Receipts and expenditures. |
| (e) the amount and nature of any bonus, gift or subsidy received by such company from any source whatsoever and the source from which and the time when, and the circumstances under which, the same were so received or given; | Bonus and subsidies. |
| (f) the bonds issued at any time by such company and what portion of the same is outstanding, and what portion, if any, has been redeemed; | Bonds. |
| (g) the amount and nature of the consideration received by such company for the issue of such bonds; | Consideration therefor. |
| (h) the character and extent of any liabilities outstanding, chargeable upon the property or undertaking of such company, or any part thereof, and the consideration received by such company for such liabilities, and the circumstances under which the same were created; | Liabilities. |
| (i) the cost of construction of such company's railway or other works or of any part thereof; | Cost of construction. |
| (j) the amount and nature of the consideration paid or given by such company for any property acquired by it; | Cost of property. |

Leases and contracts.

(k) the particulars of any lease, contract or arrangement entered into between such company and any other company or person; and,

Generally.

(l) generally, the extent, nature, value and particulars of the property, earnings and business of such company; or,

Any matter.

(m) any of the matters in this section mentioned;

If wilful or negligent.

and if such company, officer, servant or agent wilfully or negligently refuses to make such return when and as thereunto required by the Board, or fails to make any such return to the utmost of its or his knowledge, or means of knowledge, such company and every such officer, servant or agent, so in default, shall severally be liable on conviction to a penalty not exceeding one thousand dollars.

Penalty.

Imprisonment for officer or servant.

2) Each such officer, servant or agent so convicted shall, in addition to such penalty, be liable to imprisonment in the common gaol of the county in which such conviction is made, for any period not exceeding twelve months. R.S., c. 37, s. 421.

See section 384, *ante*.

Making false returns.

440. (1) If any company or any officer, servant or agent of such company wilfully or negligently makes any such return to the Board falsely, or makes any false statement in any such return, such company and every such officer, servant or agent shall be severally liable on conviction to a penalty not exceeding one thousand dollars.

Penalty.

Imprisonment.

(2) Such officer, servant or agent shall also, on such conviction, be liable to imprisonment, for any period not exceeding twelve months, in the common gaol of the county where such conviction is had. R.S., c. 37, s. 422.

See section 384, *ante*.

Publishing information without leave.

441. If any officer or servant of the Board, or any person having access to or knowledge of any return made to the Board, or of any evidence taken by the Board in connection therewith, without the authority of the Board first obtained, publishes or makes known any information, having obtained the same, or knowing the same to

have been derived from such return or evidence, he shall be liable, on conviction, to a penalty not exceeding five hundred dollars for each offence, and to imprisonment not exceeding six months, in the common gaol of the county where such conviction is had. R.S., c. 37, s. 423.

See section 384, *ante*.

Railway Constables Failing in Duty.

442. (1) Every constable appointed under the authority of this Act who is guilty of any neglect or breach of duty in his office of constable shall be liable, on summary conviction, to a penalty not exceeding eighty dollars, or to imprisonment with or without hard labour for a term not exceeding two months.

(2) Such penalty may, if the constable is in receipt of a salary from the company, be deducted from any such salary due to such offending constable.

(3) Any offence under this section may be prosecuted and adjudged within any county, city, district, or other local jurisdiction of the province wherein the offence was committed. R.S., c. 37, s. 418. Am.

See section 449.

443. Every person who,—

(a) wilfully breaks down, injures, weakens or destroys any gate, fence, erection, building or structure of a company; or,

Various Offences.

(b) removes, obliterates, defaces or destroys any printed or written notice, direction, order, by-law or regulation of a company, or any section of or extract from this Act or any other Act of Parliament, which a company or any of its officers or agents have caused to be posted, attached or affixed to or upon any fence, post, gate, building or erection of the company, or any car upon any railway; or,

(c) enters upon any railway train, with intent fraudulently to be carried upon the said railway without paying fare thereon; or,

(d) wilfully obstructs or impedes any officer or agent

Penalty.

Failure of constable in duty.

Penalty.

Deduction from salary of constable.

Venue.

Destroying or injuring structures.

Removing or defacing notices.

Fraudulently entering train.

Obstructing
officer of
company.

Trespass on
property of
Company.

Penalty.

of any company in the execution of his duty upon any train, or railway, or upon any of the premises of the company; or,

- (e) not being an employee of the company, wilfully trespasses by entering upon any of the stations, cars or buildings of the company in order to occupy the same for his own purposes;

shall be liable on summary conviction to a penalty not exceeding fifty dollars, or in default of payment to imprisonment with or without hard labour for a term not exceeding two months. R.S., c. 37, s. 425. Am.

The words "with or without hard labour" have been added after "imprisonment" in the penalty clause of this section.

Destruction of Railway Property.

With this section should be read section 517 of the Criminal Code. Obstructing Railways. With this compare section 519 of the Criminal Code.

Penalties not Otherwise Provided.

Company or
officer doing
or omitting
to do any-
thing against
this Act.

444. Any company, which, or any person who, being a director or officer thereof, or being a receiver, trustee, lessee, agent, or otherwise acting for or employed by such company or being a contractor or other person having to do with the railway or other works of the company, does, causes or permits to be done, any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders, regulations, or directions of the Governor in Council, or of the Minister, or of the Board, made under this Act, or omits to do any matter, act or thing, thereby required to be done on the part of any such company or person shall, if no other penalty is provided in this or the Special Act for any such act or omission, be liable for each such offence to a penalty of not less than twenty dollars, and not more than five thousand dollars, in the discretion of the court before which the same is recoverable. R.S., c. 37, s. 427 (1). Am.

Penalty.

Sub-sec. 2 of former section 427 is now section 385 **q.v.** The first two lines of former section 427 (1) have been redrafted for greater clearness and the words "or otherwise" inserted before "acting for" in the third line—the fourth and fifth lines are new.

See notes to section 385, and cases there cited.

Continuing Offences.

445. When the violation of or failure to comply with any provision of this Act, or with any regulation, order or direction of the Governor in Council, the Minister, the Board or any inspecting engineer, is made, by this Act or any regulation thereunder, an offence subject to penalty, each day's continuance of such violation, or failure, to comply, shall constitute a new and distinct offence. R.S., c. 37, s. 428.

Each day's violation of this Act a distinct offence.

Company Liable for Acts of its Officers and Agents.

446. (1) For the purpose of enforcing any penalty under any of the provisions of this Act, or enforcing any regulation, order, or direction of the Governor in Council, the Minister, the Board, or any inspecting engineer, made under this Act, the act, omission, or failure of any officer, agent, or other person acting for, or employed by the company, shall, if within the scope of his employment, in every case be also deemed to be the act, omission or failure of such company.

Company liable for act or omission of officer, etc.

(2) Anything done or omitted to be done by the company which if done or omitted to be done by any director, or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by the company, would constitute an offence under this Act, shall also be held to be an offence committed by such company, and, upon conviction of any such offence, the company shall be subject to the like penalties as are prescribed by this Act with reference to such persons. R.S., c. 37, s. 429.

Company liable to same penalty as individual offender.

Penalties Constitute a First Charge.

447. If any company has been convicted of any penalty under this Act, such penalty shall be the first lien or charge upon the railway, property, assets, rents and revenues of the company. R.S., c. 37, s. 430.

Penalties a first charge on railway.

Procedure.

448. (1) If any penalty, prescribed for any offence under this Act, or under any order, rule or regulation of the Board, is one hundred dollars or less, with or with-

If penalty \$100 or less.

out imprisonment, the penalty may, subject to the provisions of this Act, be imposed and recovered on summary conviction before a justice of the peace.

If more than
\$100 and less
than \$500.

(2) If the penalty prescribed is more than one hundred dollars and less than five hundred dollars, the penalty may, subject as aforesaid, be imposed and recovered on summary conviction before two or more justices, or before a police magistrate, a stipendiary magistrate, or any person with the power or authority of two or more justices of the peace.

Board may
require
Attorney
General to
proceed.

(3) Whenever the Board has reasonable ground for belief that any company, or any person or corporation is violating or has violated any of the provisions of this Act, or any order, rule or regulation of the Board, in respect of which violation a penalty may be imposed under this Act, the Board may request the Attorney General of Canada to institute and prosecute proceedings, on behalf of His Majesty, against such company or person or corporation for the imposition and recovery of the penalty provided under this Act for such violation, or the Board may cause an information to be filed in the name of the Attorney General of Canada for the imposition and recovery of such penalty.

Leave
required
when
penalty
exceeds \$100.

(4) No prosecution shall be had against the company for any penalty under this Act, in which the company might be held liable for a penalty exceeding one hundred dollars, without the leave of the Board being first obtained. R.S., c. 37, s. 431. Am.

The Board will not itself take action against a railway employee charged with taking bribes to supply cars, nor will it otherwise attempt to discipline such employee, but in a proper case will lay the facts before the Crown authorities. **Re Conductor, A.B.**, 18 C.R.C. 54.

Railway Constables.

Appointment.

Who may
make
appoint-
ments.

449. (1) A superior or county court judge, two justices of the peace, or a stipendiary or police magistrate, in any part of Canada, a clerk of the peace, clerk of the Crown or judge of the sessions of the peace in the province of Quebec, within whose jurisdiction the railway

runs, may, on the application of the company or any clerk or agent of the company, appoint any person who are British subjects to act as constables on and along such railway.

Qualifica-
tions.

(2) Every person so appointed shall take an oath or make a solemn declaration, which may be administered by any judge or other official authorised to make the appointment or to administer oaths, in the form or to the effect following, that is to say:—

Oath to be
taken.

“I, A.B., having been appointed a constable to act upon and along (**here name the railway**), under the provisions of **The Railway Act**, do swear that I am a British subject; that I will well and truly serve our Sovereign Lord the King in the said office of constable, without favour or affection, malice or ill-will; that I will, to the best of my power, cause the peace to be kept, and prevent all offences against the peace; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge the duties thereof faithfully according to law. So help me God.”

Form of
oath.

(3) Such appointment shall be made in writing signed by the official making the appointment, and the fact that the person appointed thereby has taken such oath or declaration shall be endorsed on such written appointment by the person administering such oath or declaration. 1917, c. 37, s. 9.

Appointment
in writing.

Former section 300 (1906) as amended by c. 37 (1917) the authorities given power of appointment are more compendiously described and the appointee must be a British subject. A railway constable appointed under this section in one Province of Canada has authority to act in any other province throughout Canada, wherever the railway runs within the territorial limits prescribed by sec. 450: **Rex v. O'Brien**, 25 C.R.C. 282, so decided by the Appellate Division, Supreme Court, Alberta (1919).

Territorial Limits and Powers.

450. (1) Every constable so appointed, who has taken such oath or made such declaration, may act as a

Territorial
limits of
constable.

constable for the preservation of the peace, and for the security of persons and property against unlawful acts,—

- (a) on such railway, and on any of the works belonging thereto;
- (b) on and about any trains, roads, wharfs, quays, landing places, warehouses, lands and premises belonging to such company, whether the same are in the county, city, town, parish, district or other local jurisdiction within which he was appointed, or in any other place through which such railway passes, or in which the same terminates, or through or to which any railway passes which is worked or leased by such company; and,
- (c) in all places not more than a quarter of a mile distant from such railway.

Powers of
constable.

(2) Every such constable shall have all such powers, protection and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution of offences, and for keeping the peace, as any constable duly appointed has within his constablewick. R.S., c. 37, s. 301.

See *Rex v. O'Brien, supra*, sec. 449 as to extent of authority of constable throughout Canada. Sec. 442 provides a penalty not exceeding eighty dollars or imprisonment for any neglect or breach of duty of a railway constable and the penalty may be deducted from his salary payable by the company.

Justices.

451.(1) Any such constable may take such persons as are charged with any offence against the provisions of this Act, or any of the Acts or by-laws affecting the railway, punishable by summary conviction, before any justice or justices appointed for any county, city, town, parish, district or other local jurisdiction within which such railway passes.

(2) Every such offence may deal with all such cases, as though the offence had been committed and the persons taken within the limits of his jurisdiction. R.S., c. 37, s. 302.

This provision applies only to cases where persons are arrested and taken before a magistrate; and so where a person, walking on a railway track in Toronto, was **summoned** to appear before a justice for the County of York, who convicted him, the conviction was quashed: **Reg. v. Hughes**, 26 O.R. 486. Where a railway constable makes an arrest and carries on a prosecution, there must be evidence to connect the railway company with him so as to show agency or ratification in order to render it liable in an action for malicious prosecution: **Dennison v. Canadian Pacific Ry. Co.**, 3 Can. Ry. Cas. 368. **Thomas v. Canadian Pacific R.W. Co.**, 6 Can. Ry. Cas. 372. **Nazarino v. C.P.R.**, 11 O.W.R. 662.

In **Lambert v. Great Eastern Ry. Co.** (1909) 2 K.B. 776 it was held that a special constable of a railway company is the servant of the company and if in the course of his employment he arrests a person on suspicion of felony without having reasonable grounds for his suspicion, an action for false imprisonment will lie against the company: See 22 Halsbury's Laws of England, p. 494, sec. 1017 *et seq.*

Dismissal

452. (1) A superior or county court judge or a stipendiary or police magistrate, in any part of Canada, or a judge of the sessions of the peace in the province of Quebec, may dismiss any such constable who is acting within his jurisdiction.

Dismissal
of constables
by judge or
magistrate.

(2) The company, or any clerk or agent of the company, may also dismiss any such constable who is acting on such railway.

By company
or agent.

(3) Upon every such dismissal, all powers, protection and privileges, which belonged to any such person by reason of such appointment, shall wholly cease.

Powers to
cease on
dismissal.

(4) No person so dismissed shall be again appointed or act as constable for such railway, without the consent of the authority by whom he was dismissed. R.S., c. 37, s. 303. Am.

Reappoint-
ment.

Records and Evidence Respecting Appointment and Dismissal.

453. The company shall within one week after the date of the appointment or dismissal, as the case may be,

Company
to record
appoint-
ments and
dismissals
with clerk of
peace.

of any such constable appointed at the instance of the company, cause to be recorded in the office of the clerk of the peace for every county, parish, district, or other local jurisdiction in which any such constable is so appointed,—

- (a) such appointment or a certified copy thereof;
 - (b) the name and designation of any such constable;
 - (c) the date of his appointment;
 - (d) the name of the authority making such appointment; and, in the case of dismissal,
 - (e) the fact of the dismissal of any such constable;
 - (f) the date of any such dismissal; and,
 - (g) the name of the authority making such dismissal.
- R.S., c. 37, s. 304.

Book to be
kept by
clerk of
peace.

454. Such clerk of the peace shall keep a record of all such facts in a book which shall be open to public inspection, and shall be entitled to a fee of fifty cents for each entry of appointment or dismissal, and twenty-five cents for each search or inspection, including the taking of extracts. R.S., c. 37, s. 305.

Records as
to railway
constables
to be
evidence.

455. The records relating to appointments and dismissals of railway constables, required by this Act to be kept by the respective clerks of the peace for the counties, parishes, districts or other local jurisdictions in which such constables are appointed, shall, without further proof than the mere production of such records, be **prima facie** evidence of the due appointments of such constables, of their jurisdiction to act as such, and of the other facts by this Act required to be so recorded. R.S., c. 37, s. 75.

Miscellaneous.

Sunday Observances.

Railway to
be subject to
provincial
legislation in
force in 1904.

456. (1) Notwithstanding anything in this Act, or in any other Act, every railway, situate wholly within one province of Canada and declared by the Parliament of Canada to be either wholly or in part a work for the general advantage of Canada, and every person employed

thereon, in respect of such employment, and every person, company, corporation or municipality owning, controlling or operating the same wholly or partly, in respect of such ownership, control or operation, shall be subject to any Act of the legislature of the province in which any such railway is situate which was in force on the tenth day of August, one thousand nine hundred and four, in so far as such Act prohibits or regulates work, business or labour upon the first day of the week, commonly called Sunday.

(2) Every such Act, in so far as it purports to prohibit, within the legislative authority of the province, work, business or labour upon the said first day of the week, is hereby ratified and confirmed and made as valid and effectual, for the purposes of this section, as if it had been duly enacted by the Parliament of Canada.

Such legislation confirmed.

(3) The Governor in Council may, by proclamation, confirm, for the purposes of this section, any Act of the legislature of any province passed after the tenth day of August, one thousand nine hundred and four, in so far as such Act purports to prohibit or regulate, within the legislative authority of the province, work, business or labour upon the said first day of the week; and such Act shall, to the extent aforesaid, be by force of such proclamation, ratified and confirmed and made as valid and effectual, for the purposes of this section, as if it had been enacted by the Parliament of Canada.

Subsequent legislation may be adopted by proclamation.

(4) Notwithstanding anything in this Act, or in any other Act, every railway, wholly situate within the province, and which has been declared by the Parliament of Canada to be in whole or in part a work for the general advantage of Canada, and every person employed thereon, in respect of such employment, and every person, company, corporation or municipality, owning, controlling or operating the same wholly or partly, in respect of such ownership, control or operation, shall, from and after such proclamation, be subject to such Act in so far as it has been so confirmed.

Effect of proclamation.

Exceptions.

(5) Nothing in this section shall apply to any railway or part of a railway,—

- (a) which forms part of a continuous route or system operated between two or more provinces, or between any province and a foreign country, so as to interfere with or affect through traffic thereon; or,
- (b) between any of the ports on the Great Lakes and such continuous route or system, so as to interfere with or affect through traffic thereon; or,
- (c) which the Governor in Council by proclamation declares to be exempt from the provisions of this section. R.S., c. 37, s. 9. Am.

The only amendment in this (former section 9) section is to omit the words in line 2 of sub-sections 1 and 4 “steam or electric street railway or tramway” after “every railway” and in line 10 of sub-section 1, “or tramway” after “railway” as being apparently surplusage.

Sub-section 5 was enacted by 4 Edw. VII., cap. 32, sec. 2; the other sub-sections are practically sections 6a (1) and 6a (2) of the consolidation of 1903 with the substitution of the words “within the legislative authority of the Province” in sub-sections 3 and 4 of the present Act for the words “in so far as it is in other respects within the power of the legislature,” which occurred in section 6a (1) of the Act of 1903. The present enactment also omits the words “notwithstanding such declaration” which in the Act of 1903 seemed to indicate that the intention was merely to prevent a declaration by Parliament that a work was for the general advantage of Canada from having the effect of making inapplicable such provincial legislation regarding Sunday as would otherwise have been applicable to it. Such a construction of the section would have limited its operation to railways originally authorised by Provincial legislation and afterwards declared to be for the general advantage of Canada. The effect of the present section is (it is submitted) that subject to the exception in sub-sec. 3, valid legislation of a province prohibiting or regulating Sunday labor (in force on 10th August, 1904, or afterwards proclaimed as provided) shall apply to all railways whether originally incorporated by federal or by provincial

authority, which lie wholly within the Province and have been declared to be for the general advantage of Canada, if it would so apply but for the exclusive right of Parliament to legislate as to such railways. It does not purport to delegate to the provincial legislatures the exercise of the criminal jurisdiction of Parliament; only legislation "within the legislative authority of the province" is made applicable or is to be confirmed. Such legislation is made, or to be made, valid and effectual "for the purposes of this section" only; that is to say, for the purpose of making it apply to federal railways which would otherwise be unaffected by it, not because of inability of the legislatures (for lack of criminal jurisdiction or otherwise) to enact it, but because of their inability, but for this section, to make it applicable to railways under the exclusive jurisdiction of Parliament.

By section 91, sub-sec. 27 of the B.N.A. Act, 1867, criminal law is reserved for the exclusive legislative authority of the Parliament of Canada. Therefore provincial statutes rendering illegal the performance of certain acts on Sunday are *ultra vires*: **Attorney-General for Ontario v. Hamilton Street Ry. Co.** (1903) A.C. 524. In that case it was held that R.S.O. 1897, cap. 246, intituled "An Act to prevent the profanation of the Lord's Day," was illegal. The effect of this is that all changes made in the Lord's Day Act since Confederation by the Province of Ontario are unconstitutional, and the only Act in force now is C.S.U.C., cap. 104, re-enacting 8 Vic., cap. 45. The English prototype for this legislation is 29 Car. II, cap. 7. In Nova Scotia in **The Queen v. Halifax Electric Ry. Co.**, 30 N.S.R. 469, the principles discussed in the above cases are also considered with reference to Nova Scotian legislation, and a similar result is arrived at.

Under the legislation mentioned, it has been held that the exception in sec. 1 of the Act rendering lawful the conveying of "travellers" will apply to all persons carried, whether for business or pleasure, with luggage or without, and on a through journey or for a short distance: **Reg. v. Daggett**, 1 O.R. 537; **Attorney-General v. Hamilton Street Ry. Co.**, 27 O.R. 49; 24 A.R. 170; and also that corporations are not within the scope or intention of the Act: **Attorney-General v. Hamilton Street Ry. Co.**, *supra*. Railways which are declared to be for the general advantage of Canada cannot of course be affected in their operation by provincial legislation (except so far as sec. 4, *supra*, makes such legislation applicable) and therefore their employees who work for them on

that day cannot be prosecuted for a breach of the Statute: **Reg. v. Reid**, 30 O.R. 732.

Besides the attempt to ensure abstinence from ordinary travelling on Sunday by making it an offence, which, as will be seen has failed, it has been usual in Ontario in granting charters for local electric and street railway companies to provide that their powers of operation shall be conferred upon them for every day except Sunday. The effect of this was considered in **Attorney-General v. Niagara Falls Park, etc., Ry. Co.**, 19 O.R. 624; 18 A.R. 453; and it was held that though the company might be guilty of a nuisance if it used the streets on Sunday, and might be unable to plead legislative authority for doing any damage ordinarily incident to running its cars; yet there was no express prohibition against running on Sunday, and it ought not to be restrained upon information filed by the Attorney-General from operating its cars on that day, as no substantial injury to the public or to proprietary rights was shewn. Similar, but more specific qualifications appear in various private Acts incorporating these Companies, and also in general Acts providing for their incorporation. Where railway companies so incorporated became by enactment or otherwise works for the general advantage of Canada, it became a question whether such restrictions upon their powers of operation when removed to federal jurisdiction could any longer exist.

This section of the Act of 1906 was considered in **Kerley v. London & Lake Erie Ry. Co.**, Boyd, C., 14 C.R. C. 111, 6 D.L.R. 189, 26 O.L.R. 588, and by the Appellate Division, 15 C.R.C. 337, 13 D.L.R. 365, 28 O.L.R. 606. It was held, reversing the original judgment, that sec. 193 of the Ontario Railway Act, 1906, ch. 30, was not binding upon an electric railway situate wholly within Ontario, incorporated by the Dominion Parliament with powers to operate beyond the limits of the Province and declared to be for the general advantage of Canada, and that prosecution under the Sunday observance laws of Ontario against such a Dominion Railway could not be maintained merely upon the ground that the company had not actually exercised its powers outside the Province. This section has been held to be *intra vires* of the Parliament of Canada: **Kerley v. London, etc., Transportation Co.**, 14 C.R.C. 111. For Dominion legislation regarding Sunday, see The Lord's Day Act, R.S.C., ch. 153. Its provisions were applied to permit the movement of grain on the Lord's Day in **Re Lord's Day Act**

& G.T.R., 8 C.R.C. 23; Re Lord's Day Act and C.P.R., 11 C.R.C. 193.

Ascertaining Grand Trunk Pacific Railway Earnings.

457. (1) In order to the ascertainment of the true net earnings of,—

Ascertain-
ment of
true net
earnings of
G.T.P.R.

(a) the Eastern Division of the Grand Trunk Pacific railway, for the purposes of the scheduled agreements referred to in the Act passed in the fourth year of the reign of His late Majesty King Edward the Seventh, chapter twenty-four, intituled **An Act to amend The National Transcontinental Railway Act**; and,

1904, c. 24.

(b) the Grand Trunk Pacific Railway Company, upon its system of railways, at all times while the principal or interest of any bonds made by the said Company and guaranteed by the Government are unpaid by the said Company:

Inquiry by
Board.

the Board shall, upon the request of the Minister, inquire into, hear and determine any question as to the justness and reasonableness of the apportionment of any through rate or rates between the Grand Trunk Pacific Railway Company and any other transportation company, whether such company is or is not a railway company, or, if a railway company, whether it is or not as such subject to the legislative jurisdiction of the Parliament of Canada.

Government
interests.

(2) In any such determination the Board shall have due regard to the interests of the Government of Canada as owner of the said Eastern Division, and of the Intercolonial Railway, or as guarantor of any such principal or interest, and to the provisions of **The National Transcontinental Railway Act**, and of the said Act in amendment thereof, and of the said scheduled agreements.

1903, c. 71.

Net earn-
ings.

(3) Although, in any such case, the Grand Trunk Pacific Railway Company has agreed to any apportionment, the net earnings shall be ascertained upon the basis of the receipt by the Grand Trunk Pacific Railway Company of such share of such through rate or rates as,

Apportion-
ment.

Appeal.

in the opinion of the Board, the said Company should have received under a just and reasonable apportionment; and such agreement shall be material evidence only and not conclusive.

(4) Either party to any such question may appeal from any such determination to the Supreme Court of Canada. R.S., c. 37, s. 27.

Regulations and Orders of the Railway Committee of the Privy Council.

Regulations
and orders
continued.

1888, c. 29.

458. (1) All regulations and orders made by the Railway Committee of the Privy Council, under the provisions of **The Railway Act, 1888**, in force on the first day of February, one thousand nine hundred and four, shall continue in force until repealed, rescinded, changed or varied under the provisions of this Act.

Board may
repeal.

(2) The Board shall have the like powers to repeal, rescind, change or vary such regulations and orders, as in the case of regulations or of orders which the Board may make under this Act. R.S., c. 37, s. 32.

Existing
orders of
Railway
Committee.

1888, c. 29.

459. (1) Notwithstanding the repeal of **The Railway Act, 1888**, the orders of the Railway Committee of the Privy Council in force on the first day of February, one thousand nine hundred and four, may be made rules or orders of the Exchequer Court, or of any superior court of any province in Canada, and may be enforced in all respects, as nearly as may be, in the same manner as provided by this Act, in the case of similar orders by the Board.

Penalties
for dis-
obeying.

(2) All penalties, forfeitures and liabilities attaching, under this Act, to the violation of any regulation or disobedience to any order of the Board, shall apply and attach to any violation of or disobedience to any regulation or order of the Railway Committee of the Privy Council occurring after the first day of February, one thousand nine hundred and four, in all respects, as nearly as may be, as if such regulation or order of the Railway Committee of the Privy Council were a regulation or order of the Board. R.S., c. 37, s. 33.

460. (1) The Governor in Council shall continue to have authority and jurisdiction to sanction, confirm, rescind or vary, or to take any other action upon any report, order or decision of the Railway Committee of the Privy Council made before the first day of February, one thousand nine hundred and four, under **The Railway Act, 1888**, in as full and ample a manner as if the said Act had not been repealed and as if this Act had not been passed.

Powers of
Governor in
Council
continued.

1888, c. 29.

(2) Any order or decision so sanctioned or confirmed shall have the same validity, force and effect as if the said order or decision had been so sanctioned or confirmed prior to the first day of February, one thousand nine hundred and four. R.S., c. 37, s. 34.

Orders and
decisions
confirmed.

The sanction of the Governor in Council was required to an order of the railway committee made under section 187 of the Act of 1888. Without such sanction an Order of the Committee was not **in force** and could not be dealt with by the Board. To meet the case of such orders, section 1 of 4 Edw. VII., cap. 32, as above set forth, was passed, providing that the Governor in Council might still exercise his powers under the previous Act.

See **Yonge St. Bridge Case**, 6 O.W.R. 852, 10 O.W.R. 483.

REPEAL.

Repeal

461. The following Acts are hereby repealed to the extent and with the exceptions hereby set forth:—

Year.	Chapter.	Title.	Extent of Repeal.
The Revised Statutes of Canada, 1906	37	An Act respecting Railways	The whole, except section two hundred and forty-seven in so far as that section applies to any person or company having legislative authority from the Parliament of Canada to acquire, construct, operate or maintain works, machinery, plant, lines, poles, tunnels, conduits or other means for receiving, generating, storing, transmitting, distributing or supplying electrical or other power or energy, but not including a railway company or a telegraph company or telephone company.
1907	37	An Act in amendment of the Railway Act	The whole.
1907	38	An Act to amend the Railway Act..	The whole, except section 3, 5, 6.
1908	18	An Act to amend the Criminal Code and to repeal section 415 of the Railway Act	Section 15.
1908	60	An Act to amend chapter 38 of the Statutes of 1907 in amendment of the Railway Act	The whole.
1908	61	An Act to amend the Railway Act with respect to Telegraphs and Telephones and the jurisdiction of the Board of Railway Commissioners	The whole.
1908	62	An Act to amend the Railway Act as respects the constitution of the Board of Railway Commissioners..	The whole.
1909	31	An Act to amend the Railway Act..	The whole.
1909	32	An Act to amend the Railway Act..	The whole.
1910	50	An Act to amend the Railway Act..	The whole.
1910	57	An Act to control the rates and facilities of Ocean Cable Companies, and to amend the Railway Act with respect to Telegraphs and Telephones and the jurisdiction of the Board of Railway Commissioners..	The whole.
1911	22	An Act to amend the Railway Act..	The whole.
1913	44	An Act to amend the Railway Act..	The whole.
1914	50	An Act to amend the Railway Act..	The whole.
1916	2	An Act to amend the Railway Act..	The whole.
1917	37	An Act concerning the payment of salaries or wages of employees of railway companies and to otherwise amend the Railway Act.	The whole

Section 247 is not repealed in certain cases in consequence of the decision in **Toronto & Niagara Power Co. v. North Toronto**, 14 C.R.C. 392, 5 D.L.R. 43, (1912) A. C. 834.

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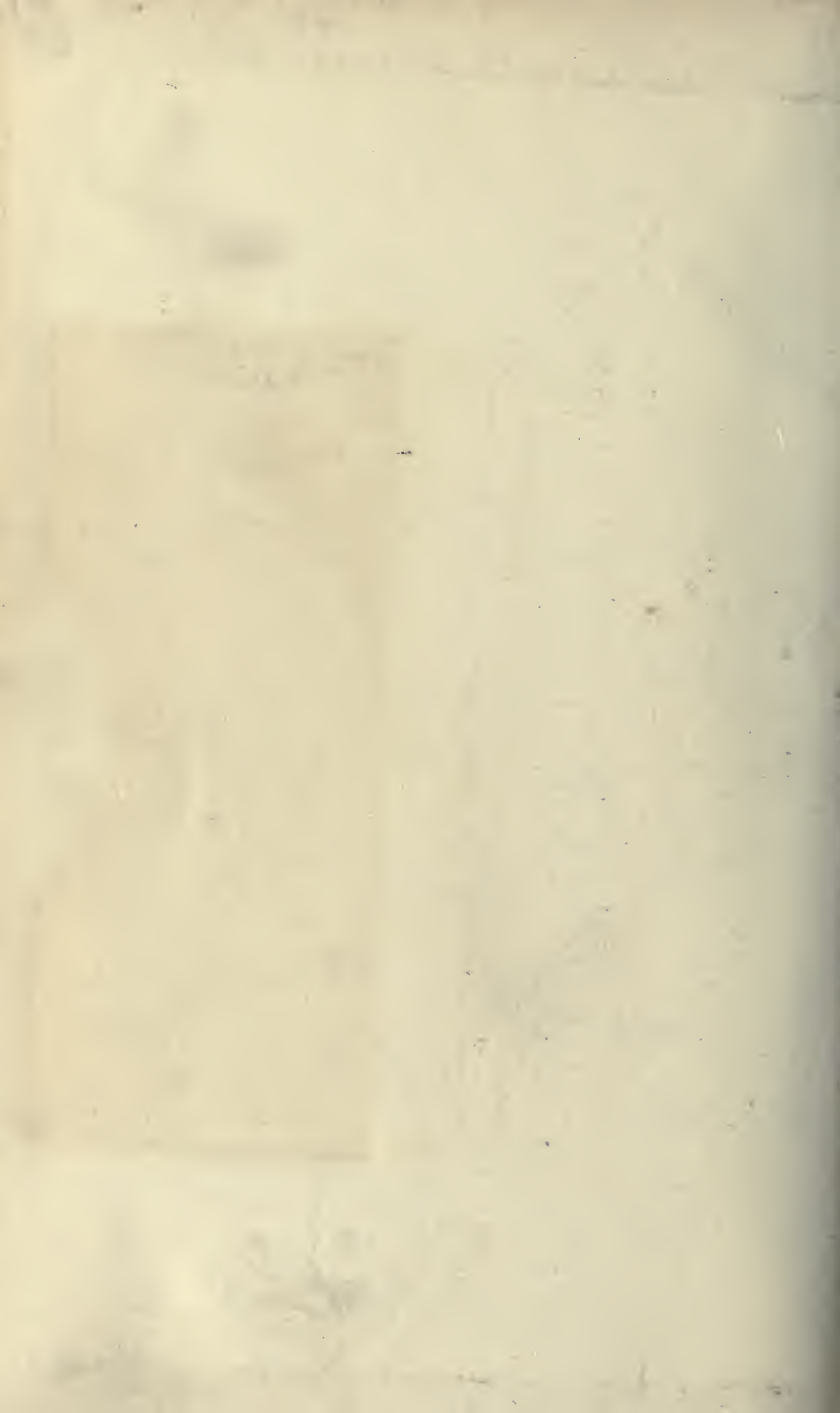
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